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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DETROIT AUTO AUCTION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the proper test to determine whether statements made by a union agent during the period just prior to a union representation election concerning strike-related benefits are promises which are violative of the National Labor Relations Act?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit were the National Labor Relations Board and Detroit Auto Auction, Inc.[1]

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[1] Petitioner, ADT Automotive, Inc., d/b/a Detroit Auto Auction, Inc., is an indirect subsidiary of Tyco International Limited.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this case on June 17, 1999.

OPINIONS BELOW

This Petition seeks review of an unpublished decision of the United States Court of Appeals for the Sixth Circuit reported at 1999 U.S. App. LEXIS 13987 (6th Cir. June 17, 1999). It appears in Appendix A, *infra* (App. 1a-29a). The National Labor Relations Board decision is reported at 324 N.L.R.B. No. 143, 157 L.R.R.M. (BNA) 1096 (1997) and is set forth in Appendix B *infra* (App. 30a-53a). The National Labor Relations Board's Hearing Officer's report and recommendations on objections is set forth in Appendix C *infra* (App. 54a-108a).

JURISDICTION

The decision of the Court below issued on June 17, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 7 and 8(a)(1), 8(a)(5) and 8(c) of the National Labor Relations Act (hereinafter referred to as "the Act"), 29 U.S.C. §§157, 158(a)(1), 158(a)(5) and 158(c) provide as follows:

> §157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §158(a)(3) of this title.
>
> §158 (a). It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§158 (c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

At issue in this case is whether a union agent's pre-election promises to provide strike-related benefits reasonably tended to interfere with the Section 7 rights of employees to freely decide whether they wanted the union as their collective bargaining representative.

A.

PROCEDURE BELOW

A union representation election was held on August 11, 1995 at Petitioner, Detroit Auto Auction, Inc. (hereinafter

referred to as "DAA"). The International Union United Automobile Aerospace and Agricultural Implement Workers of America (hereinafter referred to as "the Union" or "UAW") won the election. DAA filed timely objections to conduct affecting the outcome of the representation election with the National Labor Relations Board (hereinafter referred to as "the NLRB" or "the Board"). A hearing was conducted and an NLRB hearing officer issued a report in which she recommended that DAA's objections be overruled and that the Union be certified as the collective bargaining representative (App. 105a). DAA filed timely exceptions to the hearing officer's report. The Board adopted the hearing officer's findings and recommendations, and ordered that a certificate of representation be issued. In order to obtain judicial review of the Board's certification, DAA refused to bargain with the Union. The Union then filed an unfair labor practice charge with the Board alleging that DAA violated Sections 8(a)(5) and (1) of the National Labor Relations Act and the Regional Director for the Seventh Region of the Board issued a complaint on those charges. The General Counsel of the Board filed a motion for summary judgment. The Board granted that motion and ordered DAA to bargain with the Union. DAA sought review of the Board's

Order by filing a petition for review in the Sixth Circuit Court of Appeals. The Board filed a cross-application for enforcement of its order (App. 2a). On June 17, 1999, the United States Court of Appeals for the Sixth Circuit enforced the decision of the Board.

B.

THE FACTS

Detroit Auto Auction, Inc., which is located in Taylor, Michigan, is engaged in the business of selling, by auction, used automobiles for car manufacturers, automobile dealers and car rental companies (App. 3a). The UAW filed a petition with the National Labor Relations Board seeking to represent a group of DAA's employees (App. 3a). The Board conducted a secret-ballot election on August 11, 1995 among the employees in the petitioned-for unit (App. 3a). A majority of the employees cast their votes in the Union's favor (App. 3a). Objecting to the election, DAA claimed that the Union engaged in conduct that tainted the election results (App. 4a).

The objection at issue in this petition concerns a Union agent's pre-election promises to employees. The Company introduced three documents into evidence which resembled retail store

coupons (App. 7a). The Union organizer's notarized signature appeared on the face of each coupon (App. 108a-110a). [The Union organizer admitted being a paid agent of the UAW and acknowledged signing the three documents (App. 108a-110a). The coupons were distributed by the Union to employees just prior to the representation election (App. 3a and 4a).]

The first coupon stated, "I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. NO ONE FROM THE UAW WILL FORCE YOU TO STRIKE" (App. 108a). The second coupon stated, "I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150 a week from the strike fund. Whether or not you've ever paid dues" (App. 109a). The third coupon stated, "I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines" (App. 110a). The following was written on the reverse side of each of the coupons:

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND

"UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED (App. 108a-110a).

C.

THE SIXTH CIRCUIT COURT DECISION

In its decision the Court of Appeals for the Sixth Circuit concluded that "[t]he NLRB correctly determined that the coupons were campaign literature and not a vote-buying device" (App. 19a).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit effectively reversed the well-established principle of the Board and its own precedent that promises to employees during the pre-election period reasonably tend to interfere with the Section 7 rights of employees to make a free, uncoerced decision on the question of whether they wish to be represented by a union. The Court has also set a double standard for reviewing conduct by a union and similar conduct by an employer. By doing so, the Court did not fulfill its obligation to enforce the law as enunciated by this

Court, the Sixth Circuit, by other Courts of Appeal and by the Board.

I.

THE ELECTION MUST BE SET ASIDE BECAUSE OF THE UNION'S PRE-ELECTION PROMISES

It is a well settled labor law principle that an employer's pre-election communications must not contain a promise of benefit. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). Unions, like employers, are also prohibited from promising a benefit during the pre-election period because such communications interfere with the Section 7 rights of employees to make a free, uncoerced decision on whether they wish to be represented by a union. Mailing Services, Inc., 293 NLRB 565, 566 n. 3 (1989) ("a Union . . . like an employer, [is] barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled"); Freund Baking Co. v. NLRB, 165 F.3d 928, 931 (D.C. Cir. 1999) ("Just as the Act prohibits an employer from using threats or rewards as campaign tactics, it bars both crude and subtle forms of vote-buying on the part of the union"). The policy underlying the

prohibition against promising benefits prior to an election is "rooted in the idea that an employee's vote should be governed only by consideration of the advantages and disadvantages of unionization in his or her work environment, and not by any extraneous inducements of pecuniary value." NLRB v. L & J Equipment Co., 745 F.2d 224, 231 (3rd Cir. 1984), *on remand* 278 NLRB 485 (3rd Cir. 1986).

Although an employer's promise of benefits prior to an election is the more typical unfair labor practice claim, the Board stated just this year "that a union's . . . promise of benefits to prospective voters should be viewed just as carefully. . . ." Wells Aluminum Corp., 327 NLRB No. 119, 1999 NLRB LEXIS 59 *10 (February 11, 1999) (*rev'd on other grounds*, 1999 U.S. App. LEXIS 17947 (6th Cir., July 22, 1999)) (App. 123a). Not long ago the Sixth Circuit recognized that pre-election promises are a particularly sensitive issue. *See* NLRB v. Okun Bros. Shore Store, Inc., 825 F.2d 102, 107 (6th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) ("Both the Board and the Courts have been particularly sensitive to . . . *promises* made by either labor or management in efforts to coerce employees into voting one way or another in a union certification election"). (Emphasis added.) In its

opinion below, however, the Sixth Circuit stated that "campaign promises are not reviewed or regulated by a public agency or the courts" (App. 15a). According to the Sixth Circuit, the Board and the Courts have taken a "much different view" of campaign promises as compared with granting benefits.

The Sixth Circuit is plainly wrong. Just five months ago in VJNH, Inc., 328 NLRB No. 16, 1999 NLRB LEXIS 275 *74 (April 28, 1999) (App. 424-425a), the Board stated that granting benefits and promising benefits during the pre-election period both violate the Act to the same degree:

> It has long been recognized that the bestowal of benefits during an organizational campaign can be as coercive as a threat. It follows that, in addition to the actual grant of benefits, the promise of improved benefits in order to discourage employees from selecting the union is equally violative of the Act.

See also Apria Healthcare Group, Inc., 1999 NLRB LEXIS 577, *37 (August 12, 1999) ("Like the vice inherent in an actual conferral of benefits, a promise of benefits, made in response to

initiation of an organizing campaign or in anticipation of a representation election, violates the Act") (App. 171a).

Although the Sixth Circuit cited three cases regarding the "different view" purportedly placed on campaign promises, not one of the cases concerned pre-election promises. Rather, each case addressed *misleading* campaign propaganda, not pre-election promises. Midland Nat'l Life Ins. Co., 263 NLRB 127, 133 (1982)(campaign material in question was an employer handout on the union's bargaining record at three other employers) ("we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements"); Van Dorn Plastic Mach. Co. v. NLRB, 736 F.2d 343, 348 (6th Cir. 1984) (union flyer to employees contained inaccurate information concerning wage rates negotiated by the union at another employer) (Sixth Circuit upheld the Board's decision on the issue of misrepresentation); Contech Div. SPX Corp. v. NLRB, 164 F.3d 297, 307 (6th Cir. 1998) (union letters to employees concerning, *inter alia*, alleged Company instigated rumors regarding the plant moving and the loss of customers if the union won the election, which were misrepresentations) ("The Board correctly found that the alleged UAW misrepresenta-

tions were not so egregious as to justify setting aside the second election"). Midland Nat'l Life Ins. Co., Van Dorn Plastic Mach. Co. and Contech Div. SPX Corp. do not apply to the promises at issue here because there was no claim of misrepresentations. The instant case is purely a matter of promises of benefit by the Union. *See* Hallandale Rehabilitation and Convalescent Center, 313 NLRB 835, 837 n. 6 (1994) ("as there is no allegation that the statement was a misrepresentation, issues addressed by Midland are not presented").

In Alyeska Pipeline Serv. Co., 261 NLRB 125, 127 (1982), the Board set aside an election where employees were told that being a member of the union would give them a "definite advantage" in obtaining employment. The hearing officer in Alyeska Pipeline characterized the union's remark as permissible "puffery," but on review, the Board criticized the hearing officer's report, stating that he "mistakenly considered the statements only from the standpoint of misrepresentation. [W]e view them to be more akin to an employer's promise to grant benefits if the Union loses, or an Employer's threat of plant closure if the Union wins." Alyeska Pipeline Serv. Co., 261 NLRB at 127.

The Sixth Circuit made the same mistake here as the hearing officer did in Alyeska Pipeline and incorrectly interpreted the point of the election objection. The Union unquestionably made promises to employees—each of the coupons begins with, "I promise." Yet, the Sixth Circuit overlooked this plain fact and, citing Midland National Life Ins. Co., 263 NLRB 127 (announcing return to Shopping Kart standard on issues of campaign propaganda), dismissed the promises as "campaign literature and not a vote-buying device" (App. 19a). As stated above, Midland is not applicable because there was no claim whatsoever that the coupons were misrepresentations. The coupons contained clear *promises* of future benefits to the electorate, guaranteed by the Union. Even the Board stated in Midland, that notwithstanding its return to the Shopping Kart doctrine, it "would continue to protect against *other campaign conduct, such as . . . promises*, or the like, which interferes with employee free choice." (Emphasis added.) Midland, 263 NLRB at 133.

The Sixth Circuit's erroneous analysis continued when it stated that a campaign promise "is a form of protected speech" (App. 16a). This is not true. This Court explained over thirty years ago in Gissel Packing Co., *supra*, that the First Amendment right to free speech

is implemented through Section 8(c) of the Act and, according to that provision, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, *so long as the communications do not contain a threat of reprisal or force or promise of benefit.*'" (Emphasis added.) Gissel Packing Co., 395 U.S. at 617-618, *quoting* 29 U.S.C. § 158(c). Even the Sixth Circuit recognized that the right to free speech is not absolute and that "[t]hreats of reprisal or force or *promise of benefit* do not constitute protected speech within the meaning of section 8(c) of the Act." (Emphasis added.) NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 283 n. 3 (6th Cir. 1981).

The promises contained in the coupons were not protected speech. The undisputed evidence proves that the lead organizer for the Union made three written promises of future benefits to employees just prior to the representation election: (1) in the event of a strike, the Union would pay employees $150.00 per week from its strike fund; (2) the Union would not force employees to strike without two-thirds of all the employees in the unit voting to strike; and (3) that employees would be permitted to cross a picket line without pressure,

intimidation or Union fines (App. 7a-8a). The subject of strikes is an important issue for the voting employees which they must weigh in deciding whether to vote for the Union. The possibility of a strike means the possibility of being out of work without pay. It was a critical issue during the pre-election campaign at DAA.

The Union's three promises, made just before the vote, effectively removed the subject of strikes as an issue for employees. The Union bought pro-union votes by nullifying the "strike contingency" by promising money to employees -- weekly income from the Union if the employees engaged in a strike or weekly income from the Employer if the employees chose to work during the course of a strike because the Union promised to give the employees permission to work without reprisal. Additionally, the Union promised to make a strike a remote possibility by promising to "raise the bar" by which a strike could be authorized. The Union promised that a strike would only be authorized by a two-thirds vote by all DAA workers, not just two-thirds of those voting.

II.

THE PROMISES WERE VOTE-BUYING PROMISES, NOT PRIVILEGED CAMPAIGN PROMISES

The Sixth Circuit opined further that the Union's promises constituted campaign literature, not vote-buying promises (App. 19a). The Board, however, has characterized union *campaign* promises as those promises which can only be fulfilled by obtaining the employer's agreement through the collective bargaining process. *See* Station Operators, Inc., 307 NLRB 263 n.1 (1992) (a union's promise of benefits "that allegedly could be obtained from collective bargaining . . . do not exceed the bounds of privileged campaign propaganda"); Owens-Illinois, Inc., 271 NLRB 1235 (1984). The Board explained long ago that these union promises are privileged campaign propaganda:

> Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises of the type involved herein are easily recognized by employees to be dependent on

> contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits. The Smith Co., 192 NLRB 1098, 1101 (1971).

In contrast to campaign promises, promises that can be fulfilled without the employer's agreement are considered coercive, vote-buying promises because they have a reasonable tendency to influence the outcome of an election. As the Board found in Alyeska Pipeline Service Co., a union's promise that as a member of the union, employees would have a definite advantage in securing a job was objectionable because the union had the power to effectuate the promise. The Board reasoned that the union controlled all access to construction jobs and, as a result, the promises "were not similar to those nonviolative union statements that employees understand cannot be automatically delivered but must be achieved through collective bargaining." Alyeska Pipeline Service Co., 261 NLRB at 127 n. 4.

The three promises by the Union are not campaign propaganda because the promised-for benefits were entirely within the Union's control and were not

dependent upon obtaining DAA's agreement. The promised-for benefits here, like the promise in Alyeska Pipeline, are not dependent upon the contingencies inherent in collective bargaining. Whether to issue work permission slips during strikes, whether to pay strike benefits and the circumstances under which a strike action can be taken against an employer are all matters exclusively within the control of the Union.

This Court found in NLRB v. Savair Mfg. Co., 414 U.S. 270, 277 (1973), that a union's promise to waive an initiation fee (a matter within the union's control), for those employees who signed a recognition slip before the election was coercive because it permitted "the union to buy endorsements and paint a false portrait of employee support during its election campaign." Here, the Union was not simply buying endorsements, it bought votes in exchange for its promise to provide strike-related benefits, e.g., employees would receive $150 per week during a strike. As this Court recognized in Savair, "[a]n employer who promises to increase the fringe benefits by $10 for each employee who votes against the union, if the union loses the election, would cross the forbidden line under our decisions." Savair Mfg. Co., 414 U.S. at 278. The three promises here also crossed the forbidden line because

the Union promised, prior to the election, benefits to the employees in the voting unit. Obviously, these benefits would only be available to the employees if the Union won the election.

After ignoring the importance of this Court's Savair decision and Board precedent regarding union campaign promises, the Sixth Circuit defined vote-buying as occurring "*only* when a union promises an immediate economic benefit that will accrue only if employees vote for union representation" (emphasis added) (App. 17a). Significantly, the Court failed to cite any authority in support of this definition of vote buying. The reason for its failure to cite a case is the plain fact that there is no legal support for the Court's restrictive definition of vote buying. The Board has held that a promise can be considered "vote-buying" even though the promise is not expressly conditioned on the support of a union. As the Board recognized in Mailing Services Inc., "[a]lthough the invitation to employees to take the medical tests required no explicit showing of union support, . . . it nevertheless was made available to employees during the election campaign, with a clear indication that this benefit would remain only contingent on the selection of the Union." Mailing Services Inc., 293 NLRB at 566 n. 3.

The promises here were not expressly conditioned on the employee's support for the Union, but it defies logic to conclude that the promises were made for any other purpose than to cause the employees to elect the Union as their representative. Clearly these promises were made to "buy" the employees support for the Union.

Whether a promise is coercive or "vote-buying" is not judged by the presence of an express intention that employees favor a party to the election. As the Sixth Circuit recognized nearly twenty-five years ago: "[I]n our opinion the intent or absence of intent on the part of the Union to influence the employees' votes by the overpayments is not a controlling factor." Plastic Masters, Inc. v. NLRB, 512 F.2d 449, 450 (6th Cir. 1975). The Sixth Circuit later explained:

> The effects of an act intended to influence an election may be so minimal that the outcome remains unaffected. Conversely an unintentional act may have such a deleterious effect on the conduct of an election that the result does not reflect the voters' free will. NLRB v. Gulf States Canners, Inc., 585 F.2d 757, 759 (6th Cir. 1978)

cert. denied 452 U.S. 906 (1981).

The Board has long subscribed to this objective standard—"whether the challenged conduct has a reasonable tendency to influence the election outcome." Broward County Health Corp., 320 NLRB 212 (1995), *citing* Gulf States Canners, Inc., 242 NLRB 1326, 1327 (1979), *enf'd* 634 F.2d 215 (5th Cir. 1981), *cert. denied* 452 U.S. 906 (1981) ("In evaluating whether or not certain campaign tactics constitute objectionable conduct, the Board has generally applied an objective standard in accord with the 'tendency-to-influence test' followed by the courts"). The three promises here had a reasonable tendency to influence the outcome of the election.

The Union's three promises were clearly coercive, vote-buying promises. The Union promised in writing to pay employees $150 per week in strike benefits regardless of whether they paid dues. Although the Union Constitution states that employees will receive financial assistance during a strike, it does not specify what form the financial assistance will take or the amount of such financial assistance (Article 12, Section 13 and Article 50, Section 1 in App. 110b-110e). Thus, the Union Constitution grants the Union wide discretion in terms of providing direct

financial assistance to its members. This promise is akin to an unlawful promise by an employer that a person on layoff status would be rehired in exchange for a vote against a union. Calvine Cotton Mills, Inc., 98 NLRB 843, 847 (1952). The same considerations that prohibit an employer from making this kind of promise also apply to the Union.

Another objectionable promise made by the Union is that any employee would be given permission to cross a Union picket line without being pressured, intimidated or fined. Again, the Union has enormous discretionary power and exploits it by promising the members of the voting unit that they need not worry about the Union's most important economic weapon – a strike – because the Union will allow them to cross a picket line and work with impunity, with no fear of reprisal from the Union. In other words, the Union is unlawfully promising the employees that they can have a union with no threat of having to walk a picket line. Furthermore, the Union is unlawfully promising employees that they will have no problem from the Union if they choose to cross a picket line.

The history of the labor movement in this country is replete with examples of the importance of what this promise means. One need only observe specifi-

cally the UAW's history spanning the short period between labor disputes at the Kohler Company in Wisconsin in the 1950's to Caterpillar, Inc. in the 1990's for proof that a union member does not cross a normal picket line with impunity from the union. Significantly, the employees in this case were well aware of how unions do not tolerate employees crossing a picket line. Strikes are usually not pleasant events, but the union has the power to control the tenor of such events. Yet, the Union, in this case, promised impunity so that it could buy votes.

Lastly, the Union promised a different strike authorization procedure from the primary procedures set forth in the Union Constitution (App. 110c-110d). The Union promised that a strike would not occur unless two-thirds of all the DAA workers in the unit voted to strike. The Union Constitution, however, allows for a smaller percentage of the employees to decide the strike issue by providing that only two-thirds of the members in good standing *who actually vote* can decide to go on strike (App. 110c-110d). The Union Constitution does provide for the use of a different procedure by a Local Union (Article 50, Section 1(b) of App. 110c and 110d). Thus, the Union may exercise its discretion in deciding whether to make

good on this promise as well. The promise is that a strike is less likely because the Union will implement tougher rules for a strike at DAA if the employees vote the Union in. The three Union promises bestowed tangible benefits to the electorate and had a reasonable tendency to coerce employees.

III.

THE BENEFITS PROMISED BY THE UNION CANNOT BE EXCUSED AS FUTURE BENEFITS NORMALLY ACHIEVED IN COLLECTIVE BARGAINING

The good faith bargaining requirement under the Act extends only to mandatory subjects of bargaining. The Board has defined mandatory subjects of bargaining as "wages, hours, and other terms and conditions of employment," as set forth in Section 8(d) of the Act. Nordstrom, Inc., 229 NLRB 601,609 (1977). The touchstone is whether the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees." Nordstrom, Inc., 229 NLRB at 609. The Sixth Circuit erroneously dismissed the Union's three promises on the ground that the promises "involved the type of *future benefits* that unions normally seek to obtain for their members" (emphasis

added) (App. 17a).[2] The Union's promises cannot be characterized as future benefits which may be attained in collective bargaining because they are matters peculiar to the internal administration of the Union and beyond the scope of bargaining. *See, e.g.* Fetzer Broadcasting Co., 227 NLRB 1377, 1387 (1977) (company proposal that prohibited union from interfering with employees who engaged in activity against the union concerned "internal union affairs and covered a permissive bargaining subject").

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[2] Because the benefits promised amounted to a future benefit, not an *existing* benefit, the communications cannot be characterized as a benign promise to extend an existing benefit to new members. *See* Dart Container, 277 NLRB 1369, 1370 (1985) ("Unlike promising a newly created benefit to all employees . . ., promising to extend an existing benefit to new union members does not suggest to employees that their votes are being purchased"). Practically speaking, these so-called "future benefits" are *never* sought by unions through collective bargaining. It is unimaginable to think that a union would seek, as a *benefit* for its members, work permission slips during strikes, weekly strike benefits and a special procedure for a strike vote.

For example, the Union's promise regarding a two-third's vote for a strike authorization is similar to an employer proposal held by this Court over 40 years ago to be a nonmandatory subject of bargaining. NLRB v. Borg-Warner Co., 356 U.S. 342, 349-350 (1957). In Borg-Warner, an employer proposed a ballot clause which required a pre-strike vote among union and non-union employees on whether to accept or reject the employer's last offer. The proposal also provided that if a majority of the employees rejected the offer, the employer would be given 72 hours to submit a new proposal prior to any strike. This Court found that the ballot proposal was not a mandatory topic of bargaining because "[i]t relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment—it merely calls for an advisory vote of the employees. . . . The 'ballot' clause . . . deals only with relations between the employees and their union." Borg-Warner Co., 356 U.S. at 349-350. Similarly, the Union's promises on strike benefits and work permission slips during strikes involve internal Union matters and thus do not involve a mandatory bargaining subject. The proposals do not address any issue as between DAA and the

employees. *See* Quality House of Graphics, Inc., 1999 NLRB LEXIS 521, *41 (July 22, 1999) ("employer violated Section 8(a)(5) of the Act by insisting as a condition of reaching a collective-bargaining agreement, that the union withdraw fines it had imposed against members who crossed a picket line and returned to work during a strike"); Borden, Inc., 308 NLRB 113, 129 (1992), *enf'd* Borden, Inc. v. NLRB, 19 F.3d 502 (10th Cir. 1994), *cert. denied* 513 U.S. 927 (1994) ("a union submission of contracts for ratification by its members is a matter of internal union business, a nonmandatory subject of bargaining and a matter of legitimate concern to the Union and its members only"); Briarcliff Pavilion, 260 NLRB 1374, 1377 (1982) (employer's proposal regarding union initiation fees and dues "is a nonmandatory subject of bargaining in that it has no relationship to employees' terms and conditions of employment and involves only internal union affairs").

IV.

THE SIXTH CIRCUIT'S DECISION HAS CREATED A DOUBLE STANDARD ON PRE-ELECTION PROMISES

If left to stand, the Sixth Circuit's decision creates a double

standard that condemns pre-election promises by employers, but characterizes union pre-election promises as harmless campaign propaganda. The Board is no stranger to double standards as between employer and union conduct. In a recent decision, Randell Warehouse, 328 NLRB No. 153, 1999 NLRB LEXIS 528 *14, *52 (July 27, 1999) (App. 361a), the Board overruled a ten-year old decision and held that employer videotaping of employees engaged in protected activities has a tendency to intimidate, but that the same conduct by unions is a lawful "means by which unions can determine the identity and leanings of employees and carry out their legitimate objective of attaining majority support" (App. 375a-376a).

A Board member was very critical of the double standard reflected in the Board's decision. Member Brame stated that "the Board must treat like conduct identically" (App. 386a). Randell Warehouse, 1999 NLRB LEXIS 528 (July 27, 1999) (*Board Member J. Robert Brame III concurring in the result*). According to Member Brame:

> [N]either reality, law, nor logic can support the view that a union is "merely an outsider seeking entrance to the plant," which, in contrast to the

> employer, lacks the ability to coerce employees and hinder their exercise of rights protected by the Act. Both parties possess the potential for exercising some degree of power over employees, albeit in different forms. The majority, however, has articulated no reasoned basis for creating a "double standard" that presumptively condemns photographing of employees taking part in protected concerted activity by an employer, but not the same conduct undertaken by a union. 1999 NLRB LEXIS 528.

The United States Court of Appeals for the Fifth Circuit long ago espoused its view against the Board's use of a double standard, one for union conduct and one for employer conduct. "It would seem to us, however, that the Board should apply a *single* standard against which it will measure the campaign conduct of *all* parties who might have interfered with employee free choice. . . ." (Emphasis in original.) Home Town Foods, Inc. v. NLRB, 416 F.2d 392, 396-397 n. 9 (5th Cir. 1969).

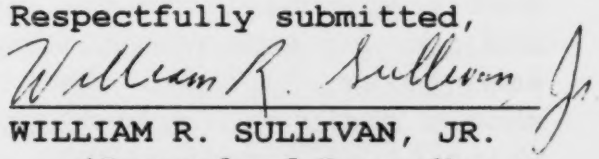
The three promises made by the Union here should be judged under the "tendency-to-influence" test that applies

to employers and not as benign campaign propaganda. Significantly there does not appear to be any reported decision where an employer's pre-election promise to grant benefits to employees in a representation election was found to be campaign propaganda. Pre-election promises, whether made by unions or employers, ought to be held to the same legal standard.

CONCLUSION

The election should be rerun because the Union's promises had a reasonable tendency to interfere with the laboratory conditions necessary for employees to freely cast their votes. For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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September 14, 1999

A P P E N D I C E S

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 13987

Before

Hon. RYAN, Circuit Judge
Hon. GILMAN, Circuit Judge
Hon. SARGUS, District Judge*

Nos. 97-6487 & 98-5096	) On Petition
	) For Review
DETROIT AUTO AUCTION,	) And Cross-
INC.,	) Application
	) For Enforce-
Petitioner,	) ment Of An
Cross-Respondent,	) Order Of The
	) National Labor
and	) Relations
	) Board.
	)
NATIONAL LABOR RELATIONS	) No. 7-CA-39942
BOARD,	)
	)
Respondent,	)
Cross-Petitioner.	)

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* Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

Petitioner/Cross-Respondent, Detroit Auto Auction, Inc. ("Detroit Auto") petitions for review of the decision rendered by Respondent/Cross-Petitioner, the National Labor Relations Board ("NLRB" or the "Board") on October 31, 1997. In its Order, the NLRB directed Detroit Auto to bargain with the International Union United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). In turn, the NLRB seeks enforcement of its order. For the reasons that follow, the Petition for Review of Detroit Auto is denied; the NLRB's Petition for Enforcement is granted.

I.

Detroit Auto is engaged in the business of remarketing automobiles through auction sales. On June 30, 1995, the UAW filed a representation petition with the Board seeking certification as the exclusive bargaining [*3] agent of the drivers, mechanics and certain other employees of Detroit Auto.

On August 11, 1995, in accordance with a stipulated agreement, the Board conducted a secret ballot election. Seventy-nine (79) votes were cast in favor of Union representation, while forty-five (45) employees voted against the Union. Eleven (11) votes were

challenged, a number which could not effect the outcome of the election.

Thereafter, Detroit Auto filed objections to the election. The employer alleged that the UAW made an unlawful promise of benefit to improperly influence employees; that threats were made to employees which prevented a free and fair election; and that improper electioneering occurred during the actual voting. Following a full evidentiary hearing, a Hearing Officer rejected all of the objections to the election filed by Detroit Auto.

The Board subsequently adopted the Hearing Officer's findings and recommendation, and certified the UAW as

the exclusive bargaining agent on behalf of the employees of Detroit Auto. The employer has refused to recognize the election results or to bargain with the UAW. Consequently, the Board issued an Order on October 31, 1997 that Detroit Auto cease [*4] and desist from violations of 29 U.S.C. § 158(a)(1) and (5) by refusing to bargain with the UAW. Detroit Auto has refused to bargain with the UAW based upon the employer's claim that the election was invalid. Resolution of both the election issues and the unfair labor practice charge turns on the conduct of the election.

II.

Detroit Auto seeks to invalidate the election on three grounds. First, the Petitioner asserts that the Union unlawfully made certain promises of benefits which prevented a fair election. Second, Detroit Auto claims that threats were made against certain employees opposing unionization which created an atmosphere that made a fair election impossible. Finally, the petitioner alleges that loud and distracting conversations occurring during actual voting prevented employees from freely casting ballots.

The Board's fact finding must be affirmed on appeal if supported by

"substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *NLRB v. Michigan Conference of Teamsters Welfare Fund*, 13 F.3d 911 (6th Cir. 1993). Further, "a party who seeks to overturn the results of a representation election has the burden to show that the election was [*5] not fairly conducted." *NLRB v. Bostik Div.*, 517 F.2d 971 (6th Cir. 1975).

A. Union Campaign Coupons

Detroit Auto's first challenge to the election is based upon three coupons distributed prior to the vote. The coupons, resembling retail store discount certificates, made three promises on behalf of the Union. The first promised

that no strike would be called without the approval of two-thirds of Detroit Auto's employees. The second promised that, in the event of a strike, strikers would receive $150 per week in strike benefits. The third coupon stated that, again in the event of a strike, any employee could request and obtain permission to cross a picket line and continue to work without pressure or intimidation.

The case law defining the scope and standards of review in a challenge to a certification election begins with the Supreme Court's opinion in *NLRB v. Savair*, 414 U.S. 270, 38 L.Ed.2d 495, 94 S.Ct. 495 (1973). There, the Court first

noted that the Board, under 29 U.S.C. § 159(c)(1), has a duty "to insure the fair and free choice of bargaining representatives by employees." *Id.* at 276 (quoting *NLRB v. Tower Co.*, 329 U.S. 324, 330 91 L. [*6] Ed. 322, 67 S.Ct. 324 (1946)).

The case law has since developed along lines not dissimilar from standards applicable to campaigns for public office. In general, both the employer and union organizers are able to engage in rigorous campaign activities, including pamphleteering, solicitation, etc. Neither labor nor management, however, may engage in vote-buying.

For example, during the period between the filing of a union certification petition and the conducting of an election, an employer may not unilaterally grant a benefit of employment without a bona fide business justification. *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899 (6th Cir. 1997). Conversely, an employer may not cancel a planned pay increase in response to the filing of a union certification petition. *GAF v. NLRB*, 488 F.2d 306 (2nd Cir. 1973).

Restrictions also have been developed as to union conduct during an organizing campaign. In *Savair*, a union offered a waiver of the $10 initiation

fee to any employee who agreed to sign a pre-election recognition slip in support of union certification. The Court described this conduct as votes being "bought and sold." *Savair*, 414 U.S. at 277. The Court concluded [*7] that such activities were sufficient to invalidate the representation election.

Similarly, in *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449 (6th Cir. 1975), this Court invalidated an election based upon certain payments by the union to employee-members of the bargaining union. While a claim was made that such payments were simply reimbursements for expenses and wage-loss resulting from campaign activities, the payments exceeded any

out-of-pocket losses, including wages, incurred by the employees. The payments represented an unlawful union "inducement" which improperly influenced the election. *Id.* at 451.

More recently, in *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995), the Teamsters' union held a rally only days before an election. The president of the union announced that the organization had, that day, initiated a lawsuit against the employer and estimated that $35,000.00 was due to each employee of the company. The Court viewed the union's lawsuit to be tantamount to a gift of free legal services provided on the eve of an

election. The suit could not be concluded prior to the election. The employees could vote for the union solely for the purpose of maintaining [*8] the lawsuit and not for the recognition of the union as their exclusive bargaining agent.

In *Freund Baking Co. v. NLRB*, 165 F.3d 928, (D.C. Cir. 1999), the court found a similar eleventh-hour-lawsuit filed by a union on behalf of employees about to vote on whether to unionize to be improper and sufficient to invalidate the election. The court held:

> The [National Labor Relations] Act is studiously neutral upon the merits of unionization..., its mandate to the Board is that elections accurately ascertain employees sentiment

> on the question of representation. As both the Board and the courts have long recognized, this goal cannot be achieved when either the employer or the union engages in tactics that induce workers to cast their votes upon grounds other than the advantages or disadvantages of union representation.

Id. at 931 (citations omitted).

While prohibiting the giving or withholding of economic benefits in exchange for or in an attempt to influence votes, the NLRB and the courts have taken a much different view as to campaign promises. E.g., *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982); *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343 [*9] (6th Cir. 1984). Recently, this Court held in *Contech Div., SPX*

Corp. v. NLRB, 164 F.3d 297 (6th Cir. 1998).

To the extent that the UAW letters might be regarded as "propaganda," such is common in almost all representation elections. The employees were free to evaluate the letters as such, and [the employer] was free to respond in kind. If absolute objectiveness and pristine conduct were required in order to sustain an election, then virtually none would survive the rough and tumble of labor-management contentiousness.

Id. at 307.

As in elections for public office, campaign promises are not reviewed or regulated by a public agency or the

courts. Consistent with the protections of the First Amendment, electioning is a form of protected speech. *Contech*, 164 F.3d at 308. Conversely, the whole notion of a free election is defeated if either side in a campaign buys votes through threats or promises.

The Petitioner argues that the coupons distributed by the Union expressly conveyed "a promise of future financial benefit." (Petitioner's Final Reply Brief, p. 5). The Petitioner claims that the NLRB mistakenly analyzed the coupons as campaign literature, which [*10] is subject to far less, if any, scrutiny, as opposed to economic

promises, which would constitute vote-buying.

The NLRB correctly points out that impermissible vote-buying occurs only when a union promises an immediate economic benefit that will accrue only if employees vote for union representation (NLRB Application for Enforcement, p. 30). A union is certainly free to extol the virtues of collective representation. The promises made here in the coupons distributed by the Union involved the type of future benefits that unions normally seek to obtain for their members, including heightened majorities for strike votes, strike pay for members and work permission during strikes.

Further, the benefits promised by the coupons would insure to all employees includable in the bargaining unit, the benefits were not limited to those who voted in favor of the Union. The promises were clearly attributable to the Union and could be evaluated by an employee as identifiable campaign literature. Finally, nothing in the coupons threatened, directly or indirectly, that an employee would suffer any kind of economic loss if the Union was defeated.

The distinction between legitimate campaign promises [*11] and illegitimate vote-buying may at times be subtle and problematic. In this case, however, the

distinction is clear. The NLRB correctly determined that the coupons were campaign literature and not a vote-buying devise. The decision as to whether the promises should be credited was correctly left to the employees of Detroit Auto.

B. Threats Against Employees

Detroit Auto claims that alleged threats against three employees, Evelyn Conrad, Shannon Hull and Natalie Sype, interfered with the employees' free exercise of choice and materially affected the results of the election. Because threats of violence may in fact prevent a free election, such conduct is never to be taken lightly. *Steak House Meat Co., Inc.*, 206 N.L.R.B. 28 (1973).

In the case of Evelyn Conrad, Detroit Auto alleges that a co-employee, Gordon Seyler, who was a member of the Union's organizing committee, made threats to Conrad. Specifically, Conrad testified before a Hearing Officer of the NLRB that Seyler threatened her by asking how she would like it if "some big bad union guy put a bomb in your purse." (JX I, p. 55).

The Hearing Officer first addressed whether Seyler was an agent of the Union. If [*12] so, any threats made by a union agent would invalidate an election if the conduct interfered with the employee's free and uncoerced choice. *Baja's Place, Inc.*, 268 N.L.R.B. 868 (1984). In

contrast, threats made by a co-worker, who is not a union agent, are analyzed under a quite different standard which questions "whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 N.L.R.B. 802, 803 (1984).

The Hearing Officer resolved conflicting evidence concerning Seyler's status. While Seyler did help prepare a Union newsletter and answered questions from employees concerning the Union, a UAW organizer conducted all meetings and was the principle source of information concerning the Union. The Hearing

Officer concluded that Seyler was not a Union agent.

Perhaps more importantly, the Hearing Officer also refused to credit Conrad's version of the alleged threat made by Seyler. According to Seyler, a co-worker had been fired for leaving the facility with company property. From this, Seyler testified that he had advised many employees not to carry bags or purses in or out of work. Seyler [*13] testified that the comment he made to Conrad was in the context of warning her not to be set up. (JX I, p. 55). Other witnesses corroborated this warning.

From this, the Hearing Officer credited Seyler's view of events. Seyler was described by the Hearing Officer as "more forthright" than Conrad. This Court must defer to credibility determinations made by the Hearing Officer, who had an opportunity to observe the witnesses and their demeanor. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). This conclusion reached by the Hearing Officer, as adopted by the NLRB, is supported by substantial evidence. Consequently, this Court need not address further whether Seyler should have been viewed as a Union agent.

Detroit Auto also claims that threats received by a Nathalie Sype

created an atmosphere of fear, preventing a free election. During her work, Sype wrote the word "No" in large chalk letters on the side of a car she was inspecting at work. The same evening, she received an anonymous call during which she was told "if you write no again, you won't be able to write." (JX I, p. 54).

The Hearing Officer concluded, and the NLRB adopted the finding, that the threat was not sufficient [*14] to create a general atmosphere of intimidation. Further, Sype had been warned by a manager of Detroit Auto not to write on the vehicles, as employees had complained that the removal of the letters caused

extra work. The conclusion that the anonymous call to Nathalie Sype did not prevent a free election is supported by substantial evidence in the record as a whole.

The final alleged threat raised by Detroit Auto involves a Shannon Hull, who also received an anonymous phone call in which the speaker stated that "if she valued Devon's [her son] life, she can vote yes or no." (JX I, p. 54). Hull's husband was a supervisor at Detroit Auto at the time she received the phone call. (JX I, p. 53, n. 4.)

The Hearing Officer viewed the threat as ambiguous, noting that the caller gave no clear indication which way

Hull should vote. While such a call is highly despicable, the caller could not be identified by Hull and the point of the threat was wholly unclear.

While threats are anathema to a free and fair election campaign, the conclusion reached by the Hearing Officer and adopted by the Board that the election itself was not conducted in a general atmosphere of fear is supported by substantial [*15] evidence.

C. Election Day Conduct

Detroit Auto also asserts that loud, prolonged noise and conversations occurring during balloting prevented a fair election. The Board has recognized that sustained electioning conducted with

prospective voters waiting in line to cast their ballots is prohibited and will require a new election. *Milchem, Inc.*, 170 N.L.R.B. 362 (1968). If the electioneering conduct, however, is not prolonged and does not involve actual representatives of labor or management, the Board looks to all attendant facts and circumstances to determine whether the electioneering "substantially impaired the exercise of free choice." *Glacier Packing Co., Inc.*, 210 N.L.R.B. 571, 573 (1974).

The Hearing Officer found that on no more than two occasions, small groups of employees gathered, clapped and chanted for less than one minute at a location

outside the polling area. Certain voters standing in line engaged in loud conversations, although no witnesses could describe the content of such conversations. (JX I, p. 57-58).

The Board, in adopting the conclusions of the Hearing Officer, correctly determined that the challenged conduct was at most de minimis, and, [*16] more importantly, no electioneering. The conclusion of the Board that election day activities did not prevent a free election is supported by substantial evidence in the record taken as a whole.

III.

Based upon the foregoing, the NLRB's Petition for Enforcement of its Decision and Order dated October 31, 1997 is GRANTED. The Petition for Review filed by Detroit Auto Auction, Inc. is DENIED.

RYAN, Circuit Judge. Concurs in the judgment only.

CONCUR BY: RYAN

APPENDIX B

Detroit Auto Auction, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, Case 7-CA-39942

October 31, 1997

DECISION AND ORDER

By Chairman Gould and Members Fox and Higgins

Pursuant to a charge filed on June 18, 1997, the General Counsel of the National Labor Relations Board issued a complaint an notice of hearing on July 23, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the national Labor Relations Act by refusing the Union's request to bargain and to furnish necessary and relevant information following the Union's

certification in Case 7-RC-20648. (Official notice is taken of the "record" in the representation proceeding as define din the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On August 29, 1997, the General Counsel filed a Motion for Summary Judgment. On September 3, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding. In addition, the Respondent denies that the information requested is necessary and relevant to the Union's duties as the exclusive bargaining representative of the unit.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not

offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to re-examine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

We also find that there are no factual issues warranting a hearing with respect to the Union's request for

information. The Union requested the following information from the Respondent:

1. Current list of all bargaining unit employees (working, laid off, or on any type leave of absence), including their:

   - Names, addresses, phone numbers and social security numbers;
   - Date of birth;
   - Date of hire;
   - Gender;
   - Classification;
   - Rate of Pay;
   - Classification Seniority, if any;
   - Current hours of work and/or shift.

2. The average total labor cost per hour, per employee, including all wages, overtime,

vacation, holiday, shift premiums, bonuses, medical insurance, dental insurance, vision insurance, sickness and accident insurance, long-term disability insurance, life insurance, FICA, unemployment compensation, and any other costs you have. We would like this specifying the per hour cost of each item.

3. The total hours worked by all bargaining unit employees for each of the past three years.

4. Income statements for the last three (3) full years.

5. General and administrative expenses, including details on management salaries and benefits.

6. Operating plans, budgets, forecasts or other documents dealing with projected costs and operating results.

7. A list of all your competitors, including company name, address, and whether they are unionized. Also, any wage and

benefit information you have on them.

8. A current list of all fringe benefits you are providing such as vacation, holiday, sick days, etc., and all insurance such as medical, life, AD&D, sickness and accident, vision, hearing, dental, etc., including an estimated cents per hour cost of each.

9. The following information relative to any pension plan:

   a. Active pension plan participants categorized by age, seniority and credited service (vesting and benefit).

   b. Retired participants categorized by date of retirement, age, credited service at retirement, amount and type of monthly benefit.

   c. Annual company contributions to the pension plan with schedule of dates and level of contributions.

d. The three most recent actuarial evaluations.

e. The three latest Department of Labor 5500 forms, including Schedule B and SSA.

f. The three latest trustee reports. If the plan is carried by an insurance company, then the latest three annual reports from the insurance company.

g. A statement indicating any major changes in fund accounting procedures or assumptions which have occurred in the past three years.

h. A current employee handbook, including rules, regulations, penalties, etc.

10. A current employee handbook, including rules, regulations, penalties, etc.

11. A current company policy manual.

12. A list of all temporary and/or probationary workers currently employed by your company.

13. A detailed list of all work that is currently being subcontracted by any temporary service, and any work that may be subcontracted in the next 12 month period, including the name and address of whom the work is contracted to.

It is well established that, with the exception of the employees' social security numbers requested in paragraph 1, the financial information and the information on competitors requested in paragraphs 4-7, and the information regarding non-unit temporary employees and subcontracting requested in paragraphs 12 and 13, all of the foregoing information is presumptively relevant for purposes of collective

bargaining and must be furnished on request.[1]

Accordingly, we grant the General Counsel's Motion for Summary Judgment and will order the Respondent to bargain and to furnish the requested information with the exception of the information mentioned above in paragraphs 1, 4-7, 12 and 13. We deny summary judgment with respect to the information mentioned above in paragraphs 1, 4-7, 12 and 13.

On the entire record, the Board makes the following

FINDINGS OF FACT

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[1] See *Dexter Fastener Technologies*, 321 NLRB 612 (1996), and cases cited therein.

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Taylor, Michigan, has been engaged in the wholesale sale of used automobiles to dealers. During the year ending December 31, 1996, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $1 million and shipped goods valued in excess of $50,000 from its Taylor facilities directly to points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and

that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held August 11, 1995, the Union was certified on January 14, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-

> up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About January 21, 1997, the Union requested the Respondent to bargain and to furnish information and, since about the same date, the Respondent has failed and refused. We find that this failure

and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after January 21, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union necessary and relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the

Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union the information requested with the exception of employees' social security numbers, financial information, information on competitors, and information regarding non-unit temporary employees and subcontracting.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning

the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962) enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964) enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Detroit Auto Auctions, Inc., Taylor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers

of America (UAW), AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the union employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

(b) Furnish the Union the information that it requested on January 21, 1997, with the exception of employees' social security numbers, financial information, information on competitors, and information regarding non-unit temporary employees and subcontracting.

(c) Within 14 days after service by the Region, post at its facility in Taylor, Michigan, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 18, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. October 31, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive

bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-

up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by us at or out of our facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL furnish the Union the information it requested on January 21, 1997, with the exception of employees' social security numbers, financial information and information on competitors, and information regarding nonunit temporary employees and subcontracting.

DETROIT AUTO AUCTION, INC.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DETROIT AUTO AUCTION, INC.,	)	
Employer,	)	
and	)	Case No. 7-RC-20648
INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,	)	
Petitioner.	)	

HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS

Upon a petition filed in the above-captioned matter on June 30, 1995, and pursuant to a Stipulated Election Agreement approved by the Regional Director of the Seventh Region of the

National Labor Relations Board on July 25, 1995, an election by secret ballot was conducted on August 11, 1995, among the employees of the Employer in the following collective bargaining unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control

employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

The payroll period for eligibility purposes was the weekly period ending Friday, July 14, 1995.

Upon the conclusion of the election, a copy of the Tally of Ballots showing the following results, was made immediately available to each of the parties in accordance with the current Rules and Regulations of the Board:

Approximate number of eligible voters	150
Number of void ballots	0
Number of votes cast for Petitioner	79
Number of votes cast against participating labor organization	45

Number of valid votes counted 124

Number of challenged ballots 11

Number of valid votes counted plus challenged ballots 135

The number of challenged ballots were insufficient to affect the outcome of the election.

On August 18, 1995, the Employer timely filed objections to the election, a copy of which was served on the Petitioner in accordance with the Board's Rules and Regulations. The objections state, verbatim, as follows:

A. Employees were threatened and otherwise coerced with, among other things, loss of jobs or other economic

disadvantage, if they did not vote for the Union.

B. Employees' physical safety, as well as the safety of their families, was threatened if they did not vote for the Union.

C. Loud, prolonged conversations and electioneering took place in the voting line, and the Board Agents responsible for the conduct of the election did not act to stop this prohibited activity when brought to their attention.

D. The Union made misrepresentations, promises and granted benefits in exchange for employee support.

E. Employee property was destroyed and/or damaged in retaliation for not supporting the Union during the campaign.

F. Throughout the election campaign period, the Union engaged in threatening and coercive conduct which undermined the laboratory conditions which were to exist for the representation election.

G. The aforementioned, together with other conduct, created a threatening and coercive atmosphere, disrupted the election and undermined the laboratory conditions.

Based upon a preliminary investigation of the Objections, the Regional Director concluded that they

raised substantial and material factual issues, including credibility resolutions, which could best be resolved at a hearing. Accordingly, on September 6, 1995, the Regional Director issued a Notice of hearing on Objections. Thereafter, on September 18, 19 and 22, 1995, a hearing was held before the undersigned hearing officer.

The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. All parties were represented and afforded full opportunity to be heard, to present and examine witnesses, to introduce relevant evidence and to make oral

argument at the close of the hearing. Based upon the entire record herein, including my observation and evaluation of the demeanor of the witnesses.[1] I make the following findings of fact, conclusions of law and recommendations:[2]

BACKGROUND

Detroit Auto Auction (hereinafter the Employer or DAA), is primarily

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[1] Most findings of fact herein do not involve the resolution of directly conflicting testimony and all witnesses have been credited unless otherwise noted.

[2] On November 22, 1995, the Employer submitted a Motion to Correct Hearing Transcript. As I have received no objection from the Petitioner regarding the Motion to Correct and as the corrections conform with my recollection of the testimony, it will be recommended that the unopposed Motion to Correct the Hearing Transcript be granted.

engaged in the business of remarketing, via auction, new and used automobiles for major car manufacturers, automobile dealerships and car rental companies from its facilities located in Taylor, Michigan. Most of its automobile auctions are for brokers and dealers only and are closed to the general public. Located on the Gladwin property are the administrative offices, with attached sale (or auction) lanes, the reconditioning building and the condition report writing building. Located on the adjacent Eureka Road property is the building where body work is performed, plus the marshaling or storage yard. Out of the approximately 150 employees in the

unit, there are about 70 drivers, 30-35 recon/detailing employees, 30 point and body shop employees, 10 condition report writer (CRW) employees, 4 mechanics and 2-3 parts installers. The Employer's management staff at the time of the hearing were as follows:

General Manager	Bob Lalain
Assistant General Manager	Garlin Nichols
Recon Manager	Fred Montero
Maintenance Manager	Thomas Hull
Fleet & Lease Manager	James Hart
Security Supervisor	Dave Bevenuto

The election was held in Lane 7 of the sales arena in the Administrative

Building from 7:30 AM to 9:00 AM and 3:30 PM to 4:30 PM on Friday, August 11, 1995.

THE AGENCY STATUS OF THE VOLUNTEER ORGANIZING COMMITTEE AND GORDON SEYLER AND REGINALD HOLLIS

The Employer contends that certain conduct, discussed more specifically in Objections "A," "B" and "F," was engaged in by employees Gordon Seyler and Reginald Hollis. From the testimony it is clear that both Seyler and Hollis, along with other employees, were members of the Volunteer Organizing Committee (VOC). As such they attended meetings, characterized as "small meetings" by Organizer Elida Reyes, with other members of the VOC, as well as other meetings ("large meetings") held for the entire

bargaining unit. Seyler and Hollis passed out literature in the recon building and answered employees' questions about the union organizing drive or the upcoming election. There was no evidence presented that the VOC was the employees only contact with the Petitioner or the sole source of information about the Petitioner. Organizer Reyes appeared at organizational meetings as the representative of the Petitioner, answered employee questions and was available to the employees by telephone if they had any concerns. The evidence does not establish Organizer Reyes conferred any apparent authority on

Seyler or Hollis or, in fact, on any VOC member. The evidence also fails to establish that VOC members held themselves out as representatives of the Petitioner, or that by their conduct during the election campaign they were perceived as agents of the Petitioner.

Employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the Union. It is clear that Seyler and Hollis as well the other members of the VOC were active in their support of the Petitioner, and spoke out to other employees in support of the Petitioner. As organizing committee members, these employees were to relay information with

respect to Petitioner meetings, to encourage employees to attend these meetings and to distribute campaign materials on behalf of the Petitioner.

The evidence does not support the conclusion that the activities of Seyler and Hollis or any VOC member constituted the broad manifestation of authority necessary to make them agents of the Petitioner. Rather, their activities were those of enthusiastic union supporters and members of the organizing committee. *Advanced Products Corporation*, 304 NLRB 436 (1991); *United Builders Supply Co.*, 287 NLRB 1364 (1988); *Bristol Textile Co.*, 277 NLRB 1637 (1986); *Baja's Place*, 268 NLRB 868

(1984); *Beard-Poulan Division, Emerson Electric Company*, 247 NLRB 1365 (1980). Nor was there any evidence disclosed that would support a conclusion that the Petitioner held Seyler or Hollis out to be its agents or that the Petitioners instigated, solicited, authorized or ratified any conduct by them. *Kux Manufacturing Co.*, 291 NLRB No. 60; enf'd 890 F.2d 804 (CA 6) (1989).

Based upon the record evidence, I find that the pro-Petitioner conduct and activities of Seyler and Hollis do not establish that they were acting as agents of the Petitioner and any conduct ascribed to them will be evaluated under the third party conduct standard. I

further find that the testimony of the pro-Petitioner conduct and activities by any VOC member is insufficient to establish that they were acting as agents of the Petitioner and any conduct ascribed to other VOC members will be evaluated under the third party conduct standard.

THE OBJECTIONS

OBJECTION "A": Employees were threatened and otherwise coerced with, among other things, loss of jobs or other economic disadvantage, if they did not vote for the Union.

In support of this objection the Employer presented the testimony of employee Evelyn Conrad, a detailer at DAA. Ms Conrad stated that in June, 1995, during the course of the work day,

co-worker Gordon Seyler asked her what she was going to do with all her time off and when she asked what he meant, Mr. Seyler replied when she retired. Ms. Conrad testified that she linked these comments to the Union organizing campaign, even though Mr. Seyler made no mention of the Union during his conversation. While Union organizer Elida Reyes' testimony and home visit sheet indicate that Ms. Conrad had mentioned her intention to retire at the end of the summer, Ms. Conrad's testimony was that she had not discussed retirement with anyone and that while she had been asked by co-workers about retirement, she "did not say the exact date she was going

to retire because she had not decided that date herself."

Given Ms. Conrad's version of the conversation,[3] I am unable to conclude

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[3] From my observation of the witnesses during testimony, including their general demeanor, I would credit Ms. Reyes over Ms. Conrad regarding the discussion of retirement at the June 4, 1995 home visit. Ms. Reyes' testimony was straightforward and she appeared to have no difficulty in recalling the events in question. Additionally, I conclude that there would be no reasonable advantage to Ms. Reyes to fabricate a discussion of Ms. Conrad's possible retirement. The testimony is uncontradicted that Ms. Reyes related her understanding of Ms. Conrad's intent to members of the VOC, including Mr. Seyler. Mr. Seyler denies asking Ms. Conrad about her plans for retirement. In this instance, where Mr. Seyler's testimony differs from that of Ms. Conrad, I credit Ms. Conrad. I find that it is not necessary to rely on these credibility resolutions in reaching my recommendation on Objection "A." However, it is not my intent to discredit all of Mr. Seyler's

(continued...)

that Mr. Seyler asking Ms. Conrad what plans she had for retirement is any type of threat or coercion, under the broadest of definitions. No mention of the union occurred during this conversation, which appears, from the testimony, to have lasted less than one minute. There was-

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(...continued)
testimony, as he was generally a credible witness. He testified in a straight-forward and forthright manner and he seemed to have no difficulty in recalling various events. It is the opinion of this hearing officer that while Mr. Seyler testified that he had not questioned Ms. Conrad about retirement, it is more likely that he did not recall doing so, as it appears that the "questioning" was more in the light of a passing comment, rather than a lengthy or involved conversation. It is not unusual - and indeed, common - for a trier of fact to believe some, but not all, of a witnesses testimony. *Farmer Bros. Co.*, 303 NLRB 638; 649 (1991); *Caffe Giovanni, Inc. d/b/a Giovanni's* 259 NLRB 233, 236 fn7 (1981).

no testimony from Ms. Conrad that Mr. Seyler uttered anything that was or could be reasonably construed as threatening or coercive, but rather it was a passing question from one co-worker to another asked in light of the information given to Ms. Reyes during the home visit.

However, if it is concluded that Mr. Seyler's statement on its face was objectionable, I would apply the Board's third party conduct standards. I am unable to conclude that the conduct alleged in this objection was so disruptive or created an atmosphere of confusion, fear, or coercion sufficient to render impossible the rational, uncoerced expression of choice by voters.

Westwood Horizons Hotel, 270 NLRB 802 (1984); *Diamond State Poultry Co., Inc.*, 107 NLRB 3 (1953). Accordingly, it will be recommended that Objection "A" be overruled.

OBJECTION "B": Employees' physical safety, as well as the safety of their families, was threatened if they did not vote for the Union.

(1) The telephone call to Shannon Hull.

Shannon Hull,[4] a detailer of DAA, testified that she received a telephone call on July 21, 1995, about 8:00 PM at her home, in which a deep male voice told her that "if she valued Devon's life, she can vote yes or vote no." Devon is the

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[4] Ms. Hull is married to DAA maintenance supervisor Thomas Hull.

Hull's son. Ms. Hull testified that she was unable to identify the caller from his voice. While any parent is understandably concerned about a threat, either real or perceived, to their child, Ms. Hull's own testimony does not establish the intent of the caller's attempt to influence her vote. There is nothing in the testimony, other than Ms. Hull's assumptions that, because she was married to a manager of DAA, other employees would assume she would be a no vote, to link the telephone call to those who supported the union, rather than to those who did not.

(2) The telephone call to Nathalie Sypes.

Nathalie Sypes, a condition report writer at DAA, testified that on August 4, 1995, she wrote the word no on the vehicle she drove on the DAA property while performing her job duties. That evening she received a telephone call from an unidentified male, who told her that "if she wrote no again, she won't be able to write." Ms. Sypes also testified that she had been instructed by a member of DAA management, to remove the writing from her vehicle prior to turning it in to the reconditioning department, as employees had complained to management about having to do extra work to clean off the writing. Ms. Sypes testified that she removed the writing as

instructed prior to turning the vehicle in for cleaning, and concluded that the telephone call was the result of her failure to support the Petitioner.

In Ms. Hull's situation, it is unclear from the content of the conversation whether the yes vote or the no vote would endanger her son. In Ms. Sypes' situation, the caller may have been complaining about the dirty window, rather than the sentiment expressed. In any event, the testimony offered in support of these incidents is insufficient to conclude that these telephone calls were placed by agents of the Petitioner. In viewing these telephone conversations under the third

party conduct standard, I am unconvinced that these conversations had been so disruptive or created an atmosphere of confusion, fear or coercion sufficient to render impossible the rational, uncoerced expression of choice by voters. *Westwood Horizons Hotel, supra; Diamond State Poultry Co., Inc., supra.* Accordingly, it will be recommended that this portion of Objection "B" be overruled.

(3) The conversation between Evelyn Conrad and Gordon Seyler.

On July 21, 1995, employee Reginald Hollis distributed a union newsletter to employees in the reconditioning building. The distribution is more fully described below under Objection "F." Employee Evelyn Conrad testified that the

literature contained a picture which was labeled non-union worker and depicted a person with an iron collar and a big chain. Ms. Conrad indicated that she thought this picture was harassment to the non-union worker as it looked like it represented slaves. Ms. Conrad stated that she confronted Mr. Seyler about the picture, that she thought it was harassment. Mr. Seyler responded by asking if Reggie had given her the flyer and telling her that she had no business picking up the flyer. Ms. Conrad testified that as she turned to leave, Mr. Seyler asked "how she would like some big bad union guy [to] put a bomb in your purse or better still put something in

there to get fired for going out the gate." No other employees heard this statement. Ms. Conrad testified that she told about 6 to 7 co-workers about Mr. Seyler's statement. Ms. Conrad also testified that this statement caused her to think that someone, maybe Mr. Seyler or someone from the Union, had put something in her shopping buggy at K-Mart, when about one week after her conversation with Mr. Seyler, the alarm went off when she attempted to leave the store. Ms. Conrad testified that she did not see anyone that she knew while shopping and that she was told that the clerk had failed to remove a security tag from one of her purchases. Ms. Conrad

admitted that when she brought Mr. Seyler's statement to the attention of Elida Reyes, UAW Organizer, Ms. Reyes assured her that threats were forbidden and not tolerated.

Gordon Seyler testified that Ms. Conrad had come to him on July 21, 1995 and complained that Mr. Seyler was harassing her, as she felt that newsletter contained a cartoon which was a caricature of her with chains about the neck of the character. Mr. Seyler testified that he told Ms. Conrad that the cartoon had been used in many organizing campaigns and was not intended to be her. Mr. Hollis also testified that Ms. Conrad indicated to him that she

believed the cartoon in the newsletter was a depiction of herself.

Mr. Seyler testified that Paul James had been terminated during the organizing campaign for attempting to take radio equipment from the Employer's premises and it was his opinion that Mr. James had been set up to be terminated, i.e., the equipment had been placed in a bag that Mr. James used to carry personal belongings in and out of the Employer's facility. As a result of Mr. James' termination, Mr. Seyler testified that he advised "many" employees, not to carry bags in and out of the workplace, as it would be harder to set someone up if they had nothing to place the Employer's

property in.[5] Mr. Seyler specifically admitted to telling Ms. Conrad that it wouldn't be a good idea to leave her purse laying around, somebody could put something in it. Mr. Seyler specifically denied threatening Ms. Conrad in any manner, including by telling her that he or someone from the Union would put something or a bomb in her purse, because of her union activity or feelings toward the union. Ms. Conrad admitted that Mr. James had been terminated for stealing and that the general understanding and/or

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[5] Paul Conrad, nephew by marriage to Evelyn Conrad, confirming that he heard Mr. Seyler tell other employees in the reconditioning area to check their things over, to be sure the same thing that happened to Mr. James did not happen to them.

feeling of the employees at the facility was that the material Mr. James had been accused of stealing had been "planted" in his belongings.

In those instances described above where the recollection of Ms. Conrad differs from that of Mr. Seyler and Mr. Hollis, I credit Mr. Seyler and Mr. Hollis. Both testified in a straightforward and forthright manner. Ms. Conrad appeared uncomfortable on the stand and testified in a less forthright and more rehearsed manner. I feel that her description of the incident at K-Mart was unnecessary embellishment, rather than any actual concern relating to the organizing campaign. Additionally, Mr.

Seyler's explanation of what he said and why he made the statement to Ms. Conrad, as supported by Paul Conrad, is a more reasonable explanation of the conversation.

Even crediting Ms. Conrad's version of the events, I am unconvinced that this conversation was so disruptive or created an atmosphere of confusion, fear or coercion sufficient to render impossible the rational, uncoerced expression of choice by voters. *Westwood Horizons Hotel, supra; Diamond State Poultry Co., Inc., supra.* Accordingly, it will be recommended that this portion of Objection "B" be overruled.

It should be noted that any discussion of the alleged threats testified to in support of Objection "B" was limited to less than 10 employees in the reconditioning building. It should also be noted there was a good voter turnout and the closeness of the Tally must be considered in evaluating whether the threats reasonably could have prevented the free expression of choice by the voters. *Smithers Tire & Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992); *RJR Archer, Inc.*, 274 NLRB 335 (1985). Furthermore, there was no evidence presented that the alleged threats, even if made, were accompanied by acts of property damage. *Pony Express*

Courier Corporation, 282 NLRB 265 (1986); *Sub-Zero Freezer Company, Inc.*, 271 NLRB 47 (1984).

In considering the statements that comprise the allegations of Objection "B," individually or cumulatively, based on the foregoing, it will be recommended that Objection "B" be overruled in its entirety.

OBJECTION "C": Loud, prolonged conversations and electioneering took place in the voting line, and the Board Agents responsible for the conduct of the election did not act to stop this prohibited activity when brought to their attention.

As noted above, the election was conducted over two polling sessions, from 7:30 AM to 9:00 AM and from 3:30 PM to 4:30 PM. There was a great deal of

testimony from various witnesses regarding the polling location. The election took place in the east end of Lane 7 of the sales arena, which is attached to and part of, the Administration building on the Employer's Gladwin Road property. The remainder of Lane 7 is utilized as an employee break area and was so utilized on the day of the election. This break area could be entered without going through the polling area. There is a wall between lane 7 and lane 6, but there is a large opening at the east end, such that someone could stand at the Administration offices and see straight through to the polling location in Lane 7. The voting line

began in Lane 7 and at times extended through the opening into Lane 6.

Employees Tammy Pfieffer and Donald Raply testified, without contradiction, that the employees in the voting line at the morning session engaged in continuous, loud talking while waiting to cast their ballots. Both Pfieffer and Raply testified that they were unable to distinguish any specific statements or conversation, just that it was loud. Despite the testimony that some of these employees may have been wearing pro-Petitioner apparel and/or were electioneering or otherwise improper in nature. There has never been a rule requiring absolute silence among voters

waiting to vote. *Dumas Bros. Mfg. Co.*, 205 NLRB 919, 929 (1973). In *Purnell Pride, Inc.*, 265 NLRB 1190, 1192 (1982), as in the instant case, there was no evidence concerning the content of the conversations or that the employees involved in the conversations were agents of the union. Mere conversations between voters who are not representatives of any party do not *per se* warrant setting aside the election under the Board's Rule in *Milchem, Inc.*, 170 NLRB 362 (1968). Such conduct by rank and file employees is insufficient to warrant setting aside the election. *Masoneilan International, Inc.*, 223 NLRB 965 (1976); *Dumas Bros. Mfg. Co., supra.*

The afternoon pre-election conference was scheduled for about 3:00 PM. The polls were open from 3:30 PM to 4:30 PM. While the testimony of the witnesses is contradictory regarding the timing of events, the following facts are clear. At least one time, and possibly twice, 5 or 6 employees left the Lane 7 break area. They stood in Lane 6 for a period of time of less than one minute, clapping and chanting. The chanting may have included the words union yes or go union. They left the area when instructed to do so by the Board agent conducting the election.

While each party makes much of the timing of the employee actions described

above, I find that it makes little difference if their actions occurred prior to the opening of the polls, after the opening of the polls, or both. Cheering outside the polling area for a period of one minute or less, whether it occurred before or during the polling time is not of such a serious nature that voters would find it impossible to freely cast their ballots. *Northern Telecom, Inc.*, 250 NLRB 564, 568 (1980); *Southeastern Mills, Inc.*, 227 NLRB 57, 58 (1976). There was no evidence presented that any employee was in the polling area when the chanting occurred. The chanting was not voiced by one of the parties but by a group of employees; it was conducted

for two or less brief periods; it was conducted in an area outside the polling area; it was not directed at employees waiting in line to vote; it was not directed at employees on a one-to-one basis; and it could not be understood inside the polling area.[6] *Amalgamated Services and Allied Industries Joint Board (ACTWU) v. NLRB (Angelica Healthcare Services Group, Inc.)*, 815 F.2d 225, 231; 125 LRRM 2832; 2837 (CA 2) (1987); citing both *Northern Telecom and Southeastern Mills supra*. The Board has refused to set aside elections based upon

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[6] There was no testimony presented that the chanting could be heard inside the polling area if it occurred after the opening of the polls.

employees making pro-union statements in the course of voting. *Southeastern Mills supra; Intertype Company, a Division of Harris Intertype Corporation,* 164 NLRB 770 (1967). Accordingly, it will be recommended that Objection "C" be overruled.

OBJECTION "D": The Union made misrepresentations, promises and granted benefits in exchange for employee support.

The Employer relies on, as support for its position on this objection, three "coupons" distributed by the Petitioner during its campaign. Coupon 1 states "I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. NO ONE FROM THE UAW WILL FORCE YOU TO

STRIKE." Coupon 2 states "I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150.00 a week from the strike fund. Whether or not you've ever paid dues." Coupon 3 states "I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines." Each of the three coupons are photocopied onto a separate piece of paper and contain a statement which states "To all employees: To protect yourself against false promises by some union bosses and "union pushers" we

suggest you get certain promises guaranteed in writing. Ask the union boss or union pusher to sign and date each of the enclosed union guarantee certificates. Have it notarized to be protected. All three of these coupons are signed by Organizer Elida Reyes, dated August 7, 1995 and notarized by Barbara J. S_____ (about whose name there was no testimony and is unclear to this writer). There was no testimony presented about these coupons, including who authorized them, and the Employer, in its closing statement, contends they speak for themselves.

As far back as *Corn Products Refining Company*, 58 NLRB 1441, 1442

(1944), where it was stated that employees undoubtedly recognize [campaign] propaganda for what it is, and discount it and *Carrollton Furniture Manufacturing Co.*, 75 NLRB 710, 712 (1948) where the Board entrusted these [campaign] matters to the good sense of the voters, the Board has been reluctant to overturn elections based on a parties' campaign propaganda. There is nothing in the record to suggest that the employees could not recognize the campaign propaganda for what it was. The proper standard to evaluate the Petitioner's coupons is that which is set forth in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), where the Board held

that it would no longer probe into the truth or falsity of the parties' campaign statements and will not set aside elections on the basis of misleading campaign statements.

I am unable to conclude, based on the evidence presented, that the Petitioner's campaign coupons violate the standards set forth in *Midland supra*. Accordingly, it will be recommended that Objection "E" be overruled.

OBJECTION "E": Employee property was destroyed and/or damaged in retaliation for not supporting the Union during the campaign.

The Employer withdrew Objection "E" during the course of the hearing (TR. 504) and put forward no affirmative evidence in support of this Objection.

Accordingly, it will be recommended that the withdrawal of Objection "E" be approved.

OBJECTION "F": Throughout the election campaign the Union engaged in threatening and coercive conduct which undermined the laboratory conditions which were to exist for the representation election.

The Employer offered the testimony of employee Evelyn Conrad in support of this objection. Ms. Conrad testified that she was involved in several incidents with employee Reginald Hollis during the election campaign. As noted above, Mr. Hollis was an active union supporter and a member of the VOC. On an unspecified date, Ms. Conrad testified that Mr. Hollis approached Mr. Seyler and herself at Seyler and Conrad's work area.

Ms. Conrad testified that Mr. Hollis informed Mr. Seyler that he had better get back to work as Evelyn had told the boss he wasn't doing any work that day. When Ms. Conrad said that she had not done this, Mr. Hollis replied that he was just trying to get her blood boiling.

Ms. Conrad testified further that at about 4:30 AM on July 21, 1995, Mr. Hollis had brought flyers and badges (with the statement "Bring Paul Back" on them) into the breakroom in the reconditioning building. Ms. Conrad testified that Mr. Hollis handed everyone in the breakroom but herself a badge and

a flyer.[7] Ms. Conrad indicated that she picked up a flyer from breakroom table after the other employees left the breakroom.[8]

Ms. Conrad testified that later that same morning, Mr. Hollis approached her work area to talk to co-worker Peter Wolte and remarked to Wolte, lets get away from this car, as he (Hollis) did not want to talk around her (Conrad). As

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[7] Ms. Conrad was only able to identify one employee, Norm Hursey, as being among many employees in the breakroom prior to the start of the shift on the day in question. Mr. Hursey who testified on other matters, was not questioned about the incident between Mr. Hollis and Ms. Conrad on July 21, 1995.

[8] Ms. Conrad's conversation with Mr. Seyler regarding the distribution and content of the July 21, 1995 flyer is discussed about in Objection "B."

a result of this remark and the subsequent discussion between Ms. Conrad and Mr. Hollis regarding same, they met with Supervisor Fred Montero, who instructed them to apologize to each other and return to work. In the course of this meeting, Ms. Conrad states that Mr. Hollis indicated that she had no business reading the union literature.

Under cross examination, Ms. Conrad testified that she called Organizer Elida Reyes to complain about Mr. Hollis' failure to hand her a copy of the July 21, 1995 flyer and that Ms. Reyes assured her that she was entitled to receive all flyers and that Mr. Reyes would instruct both Mr. Seyler and Mr. Hollis to make

sure she received the flyers. Ms. Conrad testified that she received all subsequent flyers.

The testimony failed to establish that Mr. Hollis was acting in accordance with the Petitioner's instructions regarding the distribution of literature. *Kux Manufacturing Co., supra.* The testimony also failed to establish that Mr. Hollis was an agent of the Petitioner, as set forth above. In evaluating the above conversations under the Board's third party conduct standards, I am unable to conclude that the conduct alleged in this objection was so disruptive or created an atmosphere of confusion, fear or coercion sufficient to

render impossible the rational, uncoerced expression of choice by voters. *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *Diamond State Poultry Co., Inc.*, 107 NLRB 3 (1953). Accordingly, it will be recommended that Objection "F" be overruled.

OBJECTION "G": The aforementioned, together with other conduct, created a threatening and coercive atmosphere, disrupted the election and undermined the laboratory conditions.

This objection is conclusionary in nature and no evidence was presented unique to and in support of this objection. Accordingly, it will be recommended that Objection "G" be overruled.

RECOMMENDATIONS

The undersigned recommends that the Motion to Correct the Hearing Transcript be granted.

I have considered the Employer's objections individually and cumulatively. Based on the foregoing and the record evidence as a whole, the undersigned recommends that the request by the Employer to withdraw Objection "E" be approved and the remaining objections be overruled in their entirety and that a Certification of Representative issue.

PLEASE TAKE NOTICE that the post-report procedures set forth in the Regional Direction's Notice of Hearing on Objections in this case now become

effective. Further, under the provision of Section 102.69 of the Board's Rules and Regulations, exceptions to this report must be filed with the Board in Washington, D.C. by April 25, 1996, in order to be timely filed, absent requests for extensions of time, properly made and granted. If no exceptions are filed, the Board may adopt the recommendations set forth herein without further consideration thereof or make any other disposition of the case.

Dated at Detroit, Michigan, this 11th day of April, 1996.

/s/ Vicki Claire Lessard

Vicki Claire Lessard,
Hearing Officer
National Labor Relations Board
Seventh Region, Room 300,
Patrick V. McNamara
Federal Building
477 Michigan Avenue
Detroit, Michigan 48226-2569

I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. NO ONE FROM THE UAW WILL FORCE YOU TO STRIKE.

Signed and Guaranteed By _____ (Union Organizer)

Notarized By _____

Date 8-7-95

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND "UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED.

EXHIBIT
E-2

I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150.00 a week from the strike fund. Whether or not you've ever paid dues.

Signed and Guaranteed By _____ (Union Organizer)

Notarized By _____

Date 9-7-95

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND "UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED.

EXHIBIT
E-3
MT 9-11-95

I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines.

Signed and Guaranteed By _____ (Union Organizer)

Notarized By _____

Date 9-7-95

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND "UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED.

UNION CONSTITUTION

ARTICLE 12

Duties of the International Executive Board

Section 13. The International Executive Board shall set up such departments as provided for in this Constitution. It may, if voted by a two-thirds (2/3) vote, create additional departments for promoting the business of this International Union or the welfare of its membership. It may hire professional specialists not members of the International Union for such departments if they are not available within the membership.

ARTICLE 50

Strikes

Section 1. (a) When a dispute exists between an employer and a Local Union concerning the negotiation of a collective bargaining agreement or any other strikeable issue the Local Union or the International Executive Board may issue a call for a strike vote. All members must be given due notice of the vote to be taken and it shall require a two-thirds (2/3) majority vote by secret ballot of those voting to request strike authorization from the International Executive Board. Only members in good standing shall be entitled to vote.

(b) Where a different ratification procedure for a Local Union or an Intra-Corporation Council has been properly applied for under terms of Article 19, Section 3, and after the International Executive Board has approved such ratification procedure, the method for accepting or rejecting contract changes and the taking of strike votes shall be governed by the terms of the procedure approved by the International Executive Board for that Local Union or Intra-Corporation Council.

Section 14. If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to

render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.

Supreme Court, U.S.
FILED
99 501 SEP 15 1999
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DETROIT AUTO AUCTION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

SUPPLEMENTAL APPENDIX

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Wells Aluminum Corporation, Sidney Division	) Case Nos.	9-CA-29131
	)	9-CA-29810
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and	)	9-RC-15953
International Union, United Automobile, Aerospace Agricultural Implement Workers of America, UAW	)	

NATIONAL LABOR RELATIONS BOARD

1999 NLRB LEXIS 59;
1999-00 NLRB Dec. (CCH) P15,073;
327 NLRB No. 119

February 11, 1999

[*1] SUPPLEMENTAL DECISION ON REMAND AND ORDER

By John C. Truesdale, Chairman; Sarah M. Fox, Member; Wilma B. Liebman, Member.

OPINION

On November 30, 1995, the Board issued its decision in this case[1] in which it adopted the administrative law judge's findings that Wells, the Respondent Employer, had committed certain unfair labor practices and his recommendation to overrule Wells' objections to the election held November 14, 1991.[2] Having overruled Wells' objections to the election, the Board certified the Union as the exclusive collective-bargaining representative of the unit employees at Wells' Sidney, Ohio facility. Thereafter, Wells filed a petition for review with the U. S. Court of Appeals for the Sixth Circuit, and the Board filed a cross-petition for enforcement of its order.

On April 28, 1997, the Sixth Circuit, in an unpublished opinion,[3] reversed and remanded the case to the Board with a direction that the Board provide "a reasoned resolution of factual

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[1] *Wells Aluminum Corp.*, 319 NLRB 798. [*2].

[2] The results of the election were 30 votes for, and 25 against, the Union.

[3] Nos. 95-6691/96-5111.

questions surrounding the origin and initiation of the outsourcing issue and Wells' unfair labor practice charge that the union was guilty of making improper threats and/or offering improper inducements for pro-union votes in the election." On August 25, 1997, the court denied the Board's petition for rehearing, and on September 2, 1997, the court issued its mandate in this case. On September 25, 1997, the Board advised the parties that it had accepted the remand and invited them to file statements of position with respect to the issues raised by the remand. Both Wells and the Union filed statements of position.[4] [*3]

The Board has delegated its authority in this proceeding to a three-member panel.

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[4] On January 7, 1999, Wells filed a motion that the court deny the Board's petition to enforce the certification of representative for the reason that the Board had failed to comply with the court's mandate. On January 14, 1999, the court issued an order that the Board respond to Wells' motion by February 2, 1999. The Board filed its brief in opposition to Wells' motion with the court on February 2, 1999.

The factual issues remanded by the court to the Board for resolution concern Wells' objection I to the election in which Wells asserted that

1. The Union, through Representative Robert Hamons, threatened employees with loss of work and jobs if they did not select UAW as their representative.[5]

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[5] In addition to filing an objection to the election based on Hamons' conduct as described in its Objection 1, Wells also filed an unfair labor practice charge against the Union in Case 9-CB-8057, in which it alleged that this same conduct violated Sec. 8(b)(1)(A) of the Act. On November 29, 1991, the Acting Regional Director declined to issue a complaint based on this charge. On June 30, 1992, the General Counsel affirmed the Acting Regional Director's dismissal of the charge and by letter of August 27, 1992, denied Wells' July 8, 1992 Motion for Reconsideration of the denial of the appeal. Under Sec. 3 (d) of the Act, the General Counsel's decision as to whether a complaint should issue is not reviewable. Thus, no complaint ever issued in Case 9-CB-8057, and that case was neither litigated nor considered in the underlying proceeding. As noted above, however,

(continued...)

[*4]

Before addressing the specific factual issues presented by the court's remand, however, we shall briefly set out the facts, as found by the judge, from which Wells' Objection 1 arises; the judge's conclusions based thereon; and the Board's reasons for adopting the

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(...continued)
Hamons' conduct at issue in the "CB" case is the same conduct which Wells alleged as objectionable in its objection I in Case 9-RC-15953.

In Case 9-RC-15953, after an investigation in which, inter alia, the three employees later referred to by the court at p. 3 of its opinion submitted statements, the Acting Regional Director issued his Report on Objections, order Directing Hearing and Notice of Hearing on September 11, 1992, in which he concluded that Wells' objections to the election, including its Objection 1 at issue here, raised "substantial and material issues of fact and law which can best be resolved by a hearing." Subsequently, the Region consolidated Case 9-RC-15953 for hearing with Cases 9-CA-29131, 9-CA-29810, and 9-CA-29877.

judge's recommendation that Wells' Objection 1 be overruled.

By way of factual context, at the time of the events in question, the Union already represented a unit of employees at Navistar, a company which subcontracted (or outsourced) a significant amount of work to Wells, much of which was performed by the Wells employees whom the Union sought in the instant case to represent. In his decision, the judge set out the facts surrounding Wells' Objection 1 as follows:

On October 4, 1991, [Wells' Operations Manager] Miller posted an open letter to employees on the bulletin board, Charging Party/Petitioner's Exhibit I, in which he states, among other things, "do you believe the UAW would be more concerned about its hundreds of members at Navistar and stopping the out-sourcing there [to Wells] or would it care about the future of our plant and the lives [of] the fifty or so of us?" Miller testified that he posted the open letter [*5] in response to inquiries of about 10 employees.

On October 7, 1991, the Union held a meeting for Respondent's employees. [Employee] Hess, who attended the

meeting, testified that one of the employees present asked Union Representative Robert Hamons if some of Respondent's Navistar work, the door projects, would be moved back to Navistar, that Hamons said that if the Union was voted in, it would not try to take them from Wells because both would be union shops but if the Union was not voted in, then the UAW would try to take the door project out of Sidney and take it over to Navistar in Springfield. Ohio: that at the time about one-half of the work in the Respondent's plant was Navistar work: that 25 to 30 employees attended this meeting; and that 25 to 30 of the employees who voted in the election would be affected by a removal of the Navistar work. Subsequently, Hess testified that the employee asked the question referring to what was stated in Miller's aforementioned October 4, 1991 open letter; that 30 percent of Respondent's work at the time involved the Navistar door; and that the next morning he discussed with five or six other employees the possibility that if the Union was [*6] not voted in certain of Respondent's work would be lost. In a letter to the Board dated July 28, 1992 (R. Exh. 34), Hamons explained that when an employee asked a question about the aforementioned passage of Miller's October 4, 1991 open letter, he answered

that most jobs were sourced by the bidding procedure in today's [sic] competitive manufacturing arena, but he felt that the UAW would be less inclined to take work from the Sidney plant if they were members of the UAW but the UAW did not have the final say in the sourcing of work.[6]

In support of its objection 1, Wells contended on brief to the judge that Hamons' statement, made to over half the voting unit, constituted a threat of economic reprisal which interfered with employee free choice in the election. Relying on *Van Leer Containers, 299 NLRB 600 (1990)*, Wells further asserted that such threats were grounds for overturning an election.[7]

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[6] *Wells Aluminum Corp.*, 319 NLRB at 801.

[7] Id. at 816. In *Van Leer*, 298 NLRB at 601, the employer filed a number of election objections after the union won the December 4, 1984 election. In his report on objections, the Regional Director described the basis for employer's Objection 2, which was similar to Wells' Objection 1 at issue here:

Petitioner threatened the Employer's

(continued...)

As explained by the judge, "the burden of proving that an election should be invalidated because of objectionable conduct rests with the party filing the objections, in this case [Wells]."[8] In finding that Wells had not met its burden of establishing that Hamons' statement at

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(...continued)
employees that if it lost the election at the Employer's facility in Canton, Mississippi Petitioner would attempt, through the unfair labor practice charge in *Inland Steel Container Co.*, Case 15-CA-8983, to either have the employees' jobs in Canton transferred back to New Orleans [where the Inland Steel plan was shut down] or in the alternative, utilize its efforts to have laid-off employees in New Orleans replace those at the Employer's facility in Canton, as part of the remedy in Case 15-CA-8983.

The employer contended that it was the petitioner who referred the employees to the unfair labor practice charge and that the petitioner's conduct was tantamount to a threat of job loss unless the Canton employees selected the petitioner to represent them.

[8] *Id.* at 815, quoting *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 (1985).

issue here was objectionable, the judge also relied on *Van Leer, 298 NLRB 600 (1990)*, enfd. *943 F.2d 786 (7th Cir. 1991)*, which the judge found "similar to the [case] at hand."[9] In overruling the employer's objection in Van Leer, the Board concluded that the [union's November 30, 1984] letter, read as a whole, provides an unambiguous explanation of the union's legal obligation to represent only employees who have selected it as their representative--an explanation given, not gratuitously, but in response to questions raised by communications to

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[9] Id. The critical, allegedly objectionable, language in *Van Leer Containers*, 298 NLRB at 603, was contained in Union Representative Hubert Coker's November 30, 1984 letter to employees, specifically, the fifth paragraph, which stated:

> If a majority of the employees vote NO on December 4, then we will not be legally bound by law to represent the employees in Canton, Mississippi. Therefore, our role obligation will be to the Union members in New Orleans should the Judge rule in the Steelworkers favor. [Emphasis in original.] [*8]

employees from sources other than the Union.[10]

Finding that the Board's "reasoning" in *Van Leer* "would apply with equal force here," the judge concluded that Wells' Objection I did "not supply a reason for overturning the election."[11]

In adopting the judge's finding that Hamons' statement regarding outsourcing was not objectionable, the Board relied specifically on the facts that the remarks were made at a single union meeting, that they were made in response to a question from an employee, and that this incident took place 3 days after Miller had posted the open letter to employees. The Board found such circumstances similar to those in *Van Leer Containers v. NLRB*, 943 F.2d at 790, since "it was the employer, and not the union, that introduced the issue into the campaign, and there was no evidence [*9] of a 'pattern of coercion by the Union to

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[10] *Van Leer Containers*, 298 NLRB at 600 fn. 2.

[11] *Wells Aluminum Corp.*, 319 NLRB at 816.

convince the employees that a "Yes" vote would preserve their jobs."[12]

The specific factual issues presented by the court for resolution are (1) what was the origin of the outsourcing issue, i.e., did Wells introduce the outsourcing issue into the election debate through its October 4, 1991 open [*10] letter to employees, or was that letter a response to concerns expressed by employees; and (2) was Hamons' statement alleged as objectionable "volunteered," or was it a response to Wells' open letter or to employee questions regarding the

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[12] Id. at 798 fn. 2. The Board went on to explain that were we to accept [Wells'] position on this objection, any employer whose work force is the target of an organizing campaign by a labor organization that represents the employees of another company that contracts out work to the targeted employer would be able, by injecting the subcontracting issue into the campaign, to put the union in an untenable position. Giving inquiring employees an honest answer that reflects the union's obligation to seek to protect the job security of employees it represents would put the union at risk of having any election victory set aside on the employer's objection.

outsourcing issue. we shall now consider these factual issues. After resolving these factual issues,[13] we shall reconsider whether the judge correctly overruled Wells' Objection I to the election in light of our factual findings. In doing so, we shall be mindful of the court's concerns, as set out at pages 4-5 of its opinion:

The Board looks closely to the more usual unfair labor practice charge by a union that an employer has threatened employees or wrongfully promised benefits to defeat the union's organizing efforts. we think that a union's threat or promise of benefits to prospective voters should be viewed just as carefully to determine whether it had a substantial effect in a close election. If Hamons volunteered the

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[13] Although the court stated at p. 6 of its opinion that it believed that a remand similar to that in "Van Leer I." 841 F.2d 279 (7th Cir. 1988), was required here, we find that such a remand is not necessary because the record contains sufficient evidence to resolve the factual issues set by the court for resolution. In this regard, we note that here, in contrast to Van Leer I, a hearing has already been held in Case 9-RC-15953 and a record established regarding Wells' objections to the election.

statement attributed to him by witnesses and by the Board, we would be disposed to sustain Wells' objection. This might well constitute a direct threat of dire consequences if the union did not prevail and also a promise [*11] of benefits if it did. We cannot indicate an appropriate finding or conclusion in this respect for lack of specific findings by the ALJ and the NLRB.[14]

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[14] At pp. 6-7 of its opinion, the court further explained that:

If the NLRB's rationale in adopting the ALJ's decision is based on Hamons' statement being "in response to questions raised by communications to employees from sources other than the Union," then we believe the Board should also consider whether Wells' statement was likewise merely responsive to such questions from its own employees . . . [Further, there is no factual determination about whether the union representative's statements were, or not, responsive to Wells' letter, and no discussion about whether Wells' letter was initiated by Wells to attempt to gain an unfair advantage, or whether it was "in response to questions raised by communications" from concerned employees. If the statements by Hamons were, in effect, not instigated or caused by reason

(continued...)

It is within this larger context that we now address the factual issues remanded by the court for resolution. The first factual issue identified by the court is whether Wells introduced the outsourcing issue into the election through its October 4 open letter, or whether that letter was itself a response to concerns expressed to Miller by employees. The only testimony in the record as to the reason for the October 4 letter is that of Miller himself. He testified that an article had appeared in a Springfield newspaper "about a pending lawsuit, UAW against Navistar, for outsourcing Delco Remy at the time" and that about 10 employees asked him "what [the word outsourcing] meant and the things that were associated with it." Miller testified that he wrote the open letter "rather than go around to each employee and give the answer." On the basis of Miller's uncontradicted

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(...continued)
of the employer's own actions, in contradistinction to actions initiated by its concerned employees, we would be concerned that any UAW suggestions or warnings that Wells' employees could or would lose their jobs if they did not vote for union representation might constitute an unfair labor practice and might vitiate the election.

testimony, we find that he posted the October 4 open letter in response to inquiries from concerned employees and the newspaper article.

We shall now address the second factual issue remanded by the court for resolution, i.e., whether Hamons' statement alleged here as objectionable was "volunteered," or rather was said in response either to Wells' open letter or to employee questions regarding the outsourcing issue, or both. The [*13] only testimony as to whether the statement was volunteered is that of employee Randy Hess. As set out above, the judge stated in his decision that Hess, who was present at the October 7 meeting, testified that "one of the employees present asked . . . Hamons if some of [Wells'] Navistar work, the door projects, would be moved back to Navistar." As Hess further testified, it was in response to this question that Hamons explained that "if the Union was voted in, it would not try to take them from Wells because both would be union shops but if the Union was not voted in, then the UAW would try to take the door project Out Of Sidney and take it over to

Navistar in Springfield, Ohio."[15] Thus, the record establishes that Hamons' statement alleged as objectionable was not volunteered. Since, as in *Van Leer*, supra, the record establishes that it was "given, not gratuitously, but in response to questions raised by communications to employees from sources other than the

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[15] For the purposes of this decision, we shall credit Hess' testimony regarding Wells' Objection 1 to the election. In so doing, we observe that Hess' testimony regarding Objection 1 was not contradicted at the hearing and that Hamons, who was present at the hearing, did not testify under oath regarding the events at issue. In these circumstances, we are reluctant to credit Hamons' post-hearing version of the events at issue as set out in his July 28, 1992 letter to the Region. We do not agree, however, with the court's view, as set out at p. 6. fn. 2 of its opinion, that "the ALJ apparently gave credence to the UAW explanation." We infer, rather, that the judge found it unnecessary to resolve this issue because he found that under either version of events Hamons' statement was a lawful explanation of the Union's legal obligations to the employees whom it represented and was therefore not objectionable.

Union," this should be the end of the inquiry.

[*14]

As noted above, however, the court requested that the Board also resolve whether Hamons' statement was in response to Wells' "own actions, in contradistinction to actions initiated by its own employees." In making this request, the court indicated that "if the statements by Hamons were, in effect, not instigated or caused by reason of the employer's own actions . . . we would be concerned that any UAW suggestions or warnings that Wells' employees could or would lose their jobs if they did not vote for union representation might constitute an unfair labor practice and might vitiate the election."[16] We now address this issue.

Obviously, Hamons' statement at issue here was immediately responsive to the employee question as to what would happen "if some of [Wells'] Navistar work, the door projects, would be moved back to Navistar." As stated by the judge, however, Hess subsequently testified "that the employee asked the question referring so what was stated in

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[16] See fn. 14, above.

Miller's aforementioned October 4, [*15] 1991 open letter."[17] Thus, the employee question was raised within the context of "the employer's own actions." Given this context, we find that Hamons' statement was not only an immediate answer to the employee question, but also a response to the issues raised by Wells' open letter regarding outsourcing and where the Union's loyalty would lie if the Union represented both the Wells and Navistar bargaining units, issues which would have been of concern to all bargaining unit employees after Wells posted its open letter.

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[17] *Wells Aluminum Corp.*, 319 at 801 (emphasis added). The relevant testimony is set out at Tr. 662-663:

> JUDGE WEST: Did any employee or anyone at the meeting ask a question referring to what was stated in that letter?
>
> [HESS]- About the movement of the -
>
> JUDGE WEST: Yes.
>
> [HESS]: I think Carlinda asked it.

Thus, the Union statement at issue here was made in response to an employee who asked specifically whether certain of Wells' Navistar work "would be moved back to Navistar," and this [*16] question incorporated employee concerns regarding outsourcing and Union loyalty as set out in Wells' open letter. That open letter from Wells, though perhaps not initiated to gain what the court termed an "unfair advantage" (see fn. 14, above), certainly was intended to gain an "advantage" in the campaign. In this context, we find that Hamons' response was a fair rejoinder and, in effect, a truthful explanation of the Union's obligation to represent fairly only those bargaining units whose employees had chosen the Union to represent them. Even if Coker's November 30, 1984 letter in *Van Leer*, supra, "was a clearer exposition of the union's responsibilities in such a situation as this,"[18] we note that Hamons' answer was in immediate response to a specific employee question, and that: that question specifically asked whether certain work would be moved back to Navistar. In these circumstances, we do not fault Hamons for giving a specific and concrete answer regarding what the Union would "try" to do if it were the

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[18] Nos. 95-6691/96-5111 at 5.

representative only of the employees at Navistar and not of the Wells employees. [*17]

Finally, while employees may have feared after Hamons' statement at the October 7 meeting that they would lose their jobs if the Union lost the election, such a reaction does not here convert a truthful explanation of the Union's obligations into a threat of job loss. A union is obligated to try to act in the interests of employees whom it represents, and Hamons' answer to the questions concerning the work outsourced from Navistar was a truthful reflection of that obligation. It cannot be that a dishonest answer or a refusal to respond to the question was the proper unobjectionable course.

ORDER

Having decided the factual issues remanded to us by the court for resolution, and having reconsidered Employer's Objection 1 in light of these factual findings as well as the concerns expressed by the court in its opinion, we affirm the Board's overruling of Employer's Objection 1 in *Wells Aluminum Corp.*, 319 NLRB 798 (1995).

Dated, Washington, D.C. February 11, 1999

John C. Truesdale, Chairman
Sarah M. Fox, Member
Wilma B. Liebman, Member

VJNH, Inc. d/b/a Vestal Nursing Center and Local 200A, Service Employees International Union, AFL-CIO	))))))	Case Nos. 3-CA-21018 3-RC-10644

NATIONAL LABOR RELATIONS BOARD

1999 NLRB LEXIS 275; 328 NLRB No. 16

April 28, 1999

PRIOR-HISTORY: [*1] Original ALJ-Decision can be found at 1998 NLRB LEXIS 805.

DECISION AND ORDER

By John C. Truesdale, Chairman; Sarah M. Fox, Member; Peter J. Hurtgen, Member.

COUNSEL: Robert A. Ellison, Esq., for the General Counsel.

Carl A. Schwarz, Jr., Esq., and Matthew J. DeMarco, Esq., of Garden City, New York, for the Respondent.

Ruth Heller, Esq., and Richard A. Maroko, Esq., of Syracuse, New York, for the Charging Party.

OPINION:

On October 9, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision.* The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and an answering brief. The Charging Party filed an answering brief.

[*2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and

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* On p. 13, L. 10 of the judge's decision, the phrase "an hour and forty five minutes" should be corrected to read "a half-hour to forty-five minutes." On p. 17, L. 20 of the judge's decision, the correct date is 11199811 and not 1988.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's

(continued...)

conclusions[2] and to adopt the recommended.[3]

[*3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that

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(...continued)
credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to pass on the Union's objections 2 and 12 in light of our decision to set aside the election based on the other objections sustained by the judge.

[3] In cross-exceptions, the General Counsel has requested a modification of the Board's standard remedial provision requiring a respondent to preserve and make available payroll records for computing backpay. We find that this is not the appropriate case in which to address the requested modification.

the Respondent VJNH, Inc. d/b/a Vestal Nursing Center, Vestal, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 28, 1999

John C. Truesdale, Chairman
Sarah M. Fox, Member
Peter J. Hurtgen, Member

ALJ: WALLACE H. NATIONS

ALJ-DECISION:

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Binghamton, New York on June 1 -- 4, 1998. The original charge was filed by Local 200A, Service Employees International Union, AFL-CIO (herein Union) on December 11, 1997.[4] The first amended charge was filed January 13, 1998 and the second amended charge was filed February 18, 1998. Complaint issued February 25, 1998.

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[4] All dates are in 1997 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Charging Party, [*4] General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, VJNH, Inc., d/b/a Vestal Nursing Center, a corporation, operates a skilled nursing care center at its facility in Vestal, New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a health care institution within the meaning of Section 2(14) of the Act. It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background and Issues for Determination

As noted Respondent operates a skilled nursing center in Vestal, New York. This is a non-union facility in which the Union is seeking to represent a

unit of Respondent's employees described as follows:

All full-time and regular part-time service and maintenance employees, including all certified nursing assistants and floor aides employed at the Employer's Vestal, New York, facility; but excluding the Director of Nursing, Assistant Director of Nursing, case manager, RN Supervisors, head nurses, unit nurses, business office clerical employees, [*5] patient care coordinators, clinical coordinators, physical therapists, physical therapist assistants, social workers, music therapists, dietitians, dietary technicians, speech therapists, medical records employees, managerial employees, professional employees, and guards and supervisors as defined in the Act.[5]

The Union filed a Petition for Representation on December 12, 1997 and

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[5] In this decision, the position of certified nursing aides or assistants will be referred to as CNAs, the position of registered nurse will be referred to as RN, and the position of licensed practical nurse will be referred to as LPN.

an election was held on March 26, 1998.[6] Out of the approximately 157 eligible voters, 146 ballots were cast. The vote count was 69 for the Union, 71 against, and 6 challenged. On May 18, 1998, the Regional Director approved a stipulation resolving the eligibility issues raised by the challenged ballots. On May 19, 1998, a revised Tally of Ballots issued, reflecting that only two of the challenged ballots [*6] should be considered. Since they were not determinative, the result of the election was that the Union lost by two votes.

On April 13, 1998, the Union filed some eighteen numbered objections to conduct affecting the results of the election. On May 19, 1998, the Union withdrew objections 4, 6, 8 and 9. On May 18, the Regional Director issued an order consolidating the unfair labor practice allegations and the Objections and directed a single hearing be held in both cases. objections 1, 3, 5, 7 and 10 are coextensive with certain of the alleged unfair labor practices. Specifically, the Complaint alleges that Respondent

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[6] The campaign began in late September or early October, and Administrator Johnson learned of its existence immediately.

committed unfair labor practices in violation of the Act by:

1. On or about November 29, 1997 and on other dates in December, 1997, at the Vestal facility and in a written communication dated December 2, 1997, by its Administrator Denise Johnson, directing employees, under explicit [*7] and implicit threat of discipline, to refrain from discussing the union or engaging in Union and/or protected concerted activities while at work.[7]

2. On or about December 9, 1997, in a written communication by Johnson, directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from union supporters and to report the union and/or protected concerted activities of other employees.

3. (a) On or about December 11, 1997, by its supervisor

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[7] This alleged unfair labor practice is coextensive with the Union's objection No. 1.

and agent Cheryl Gonzalez, directing its employees, under explicit and implicit threat of discipline, to refrain from using the second floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

(b) on a date in January 1998, removing the second floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.[8]

4. (a) On or about December 16, 1997, promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia.

(b) On or about December 16, 1997, by its supervisor and agent Norma Murphy, directing its employees to

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[8] This alleged unfair labor practice is coextensive with the Union's Objection No. 10.

remove union insignia from their uniforms.

(c) On or about December [*8] 17, 1997, by its supervisor and agent Mary Beth Vasicko, in a telephone conversation, informing an employee that the employee would not be permitted to work unless the employee removed union insignia from her uniform.

(d) On or about December 17, 1997, by its supervisor and agent Mary Beth Vasicko, directing an employee to remove insignia from her uniform.

(e) On or about December 18, 1997, by its Director of Nursing Carol Scurry, directing an employee to remove union insignia from her uniform.

5. On or about December 22, 1997, by its supervisor and agent Judy Randall, prohibiting its

employees from attending a union rally.[9]

6. (a) On or about December 22, 1997, granting its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities.

(b) On a date in January, 1998, increasing the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities.[10]

7. (a) On or about December 10, 1997, imposing a seven day suspension on its employee Kathleen Camp.

(b) On or about December 16, 1997, imposing a one day

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[9] This alleged unfair labor practice is coextensive with the Union's Objection No. 5.

[10] The granting of these two benefits is also alleged as objectionable conduct in the Union's Objection No. 3.

suspension on its employee Rosanna Torres.

(c) On or about December [*9] 16, 1997, imposing a one day suspension on its employee Yvonne Torres.

(d) On or about December 17, 1997, imposing a one day suspension on its employee Vanessa Veit.[11]

In addition to the objections which are coextensive with alleged unfair labor practices, the following Objections were considered in the hearing:

No. 2 The Employer unlawfully threatened that voting for the union would inevitably result in a loss of flexibility [*10] in the workplace.

No. 11 The Employer unlawfully promised to return within one week of the election in order to "fix all the problems" if employees voted no.

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[11] The unfair labor practices set out immediately above concerning actions taken against Rosanna Torres, Yvonne Torres and Vanessa Veit are also alleged as objectionable conduct in the Union's Objection No. 7.

No. 12 The Employer unlawfully threatened that voting for the union would inevitably result in employees being forced to strike or lose benefits.

No. 13 The Employer unlawfully created and assisted an anti-union employee organization called "VNC Committee to Stop SEIU" by producing literature, paying employees to engage in anti-union activity, providing phone lists and use of facility copy equipment, telephones, etc. to conduct anti-union activity.

No. 14 The Employer unlawfully utilized a dietary supervisor as the observer for the election.

No. 15 The Employer unlawfully restricted access to the facility through the use of security and electronic surveillance.

No. 16 The Employer unlawfully threatened employees that they would not receive a scheduled pay increase as a result of the union organizing campaign.

No. 17 The Employer unlawfully solicited grievances from employees.

No. 18 The Employer unlawfully solicited revocations of union representation cards.

B. Facts and Resolution of Each Alleged Unfair Labor Practice and Objection [*11]

1. Did Respondent, on or about November 29, 1997 and on other dates in December, 1997, at the vestal facility and in a written communication dated December 2, 1997, by its Administrator Denise Johnson, unlawfully direct employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in Union and/or protected concerted activities while at work?

Vestal's Administrator Denise Johnson held meetings with employees during the latter part of November, 1997 to answer employee questions about union activity. According to Johnson, she told employees they had the right to organize. She also told them any organizing should be done in non-patient care areas and during non-work time. Prior to this there was no restriction on what employees could talk about while working except for

swearing and discussing inappropriate matters.[12]

Employee Kathleen Camp testified that at a group meeting [*12] she attended, Johnson told employees that they were not to solicit for the Union during working hours. Camp seemed to amend this testimony on cross examination when she agreed with Respondent's counsel that Johnson had told the employees that they could not solicit during working time and in working areas.

In a December 2 letter sent to all employees setting forth Respondent's opposition to the Union, Johnson wrote:

All of the staff are entitled to their own opinion and should not be afraid to express it openly. However, we must remember that our issues cannot disturb residents. Work time and work location (where residents and visitors are) may not be used to discuss union matters. Each employee has the right to discuss or not discuss these matters. No one has the right to impose himself or herself on another's privacy.

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[12] Throughout this decision, when I refer to the "facility" I am referring to Vestal Nursing Center.

Former Vestal CNA Vanessa Veit[13] testified that Denise Johnson and Director of Nursing Carol Scurry informed employees at meetings held before and after the recognition demand that employees were not allowed to talk about the Union except on break time.[14] According to Veit and other employee witnesses, there had been no restriction on what employees could talk [*13] about while working, except for swearing and "inappropriate conversations." The only example I can find of what would be an "inappropriate conversation", other than one involving the Union, was noted by Vestal LPN Michele West. She gave a warning to a CNA who in a facility hallway was talking to other employees. The warning relates: "Catherine was in the hallway. She was talking about all the weight she has lost and her pants are loose because she's having sex with Bill who was her boyfriend at the time and she told him to just let's keep on going." West also related that she was informed in an employee meeting with Johnson that employees could discuss Union matters only on break time and that they could

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[13] Veit voluntarily left employment with Vestal in March, 1998.

[14] Demand for recognition was made on December 8.

not discuss such matters in resident care areas on the units.

Though, as will be discussed further herein, Respondent for some time had maintained a written no solicitation/ no distribution rule, it [*14] did not have any formal rule restricting topics of conversation among employees. I credit the testimony of Veit and West that Respondent had not placed any restrictions on topics employees could discuss in work areas and on work time until the Union campaign. I further credit their testimony that Respondent restricted conversations about the union to break time and to non-work areas. Respondent asserts that its purpose in restricting the location and time of talk about the Union is intended to protect residents and visitors from being upset or somehow embroiled in the union organizing activity. Absent any showing that grounds actually exist for such an assumption, I believe that Respondent's restrictions on union related conversations is an unwarranted interference with employees' Section 7 rights and thus violates Section 8(a)(1) of the Act. See *Manchester Health Care Center, Inc., d/b/a Crestfield Convalescent Home*, 287 NLRB 328, 344-45 (1987); *Industrial wire Products, Inc.*, 317 NLRB 190 (1995); *Teksid Aluminum*

Foundry, 311 NLRB 711, 713 (1993). In *Teksid,* the Board adopted the holding [*15] of the ALJ that: "An employer may lawfully forbid employees to talk about a union during periods when they are supposed to be working, if that prohibition also extends to all other subjects not associated or connected with their work tasks. (citations omitted) Here, however, the employer through Williams announced a no-talking rule specifically to prevent perceived discussion of unionization and there is no indication that it was concerned about, or thereafter applied the rule to bar, discussion of other nontask-related subjects during working time."

2. Did Respondent, on or about December 9, 1997, in a written communication by Johnson, direct its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from Union supporters and to report the union and/or protected concerted activities of other employees?

On December 8, Union organizer Andrew Tripp and a group of ten to twelve facility employees presented Administrator Johnson with a number of authorization cards and a letter demanding recognition of the Union. The

demand upset Johnson because she considered the group unruly and loud, and because Tripp and some of the employees with him thereafter [*16] went through parts of the facility handing copies of the recognition demand letter to staff and residents. On December 9, Johnson had distributed to all employees a letter which states her views of the incident and in pertinent parts states:[15]

"Numerous employees have reported to me and other supervisors that they are afraid to come to work and are afraid of the Union. We don't know that this fear is justified, but if anyone interrupts you in the performance of your job, and/or harasses you regarding your opinions about this Union -- whether at the facility or not -- Please Report Them to me. You do NOT have to submit to ANY harassment, or interruption in the performance of your duties. You also do not have to submit to any activity that could affect your ability to provide for your family. But, if any of you even suspect that the care and/or peace of a resident is in jeopardy YOU MUST IMMEDIATELY REPORT THESE [*17] SUSPICIONS TO ME. "(Emphasis in original letter).

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[15] The letter somewhat overstates the seriousness of the incident and has some factual misstatements.

Other than the demand for recognition, which is discussed in detail in relation to Objection No. 15, there is no other testimony in the record regarding harassment of employees.[16] I find that this letter could easily cover legitimate union activity as it leaves to the reader to determine any perceived interruption or harassment. The letter in an earlier part states: I WILL NOT TOLERATE THREATS AGAINST YOU, OR THE FACILITY, AND I ESPECIALLY WILL NOT TOLERATE THREATS AGAINST THE RESIDENTS. (emphasis in original) Taken together, I believe the cited portions of the letter both encourages employees to report any perceived harassment and leaves the impression that some reprisal will be taken against an accused. I believe the letter clearly has a chilling effect on legitimate union activity. I find it to be a violation of Section 8(a)(1) of the Act. See, e.g., *Brunswick Electric Membership Corporation,* 308 NLRB 361, 372 (1992, [urging employees to report subjectively perceived union pressures and "harassment" could be interpreted as broad enough to cover lawful

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[16] On brief Respondent points to a charge lodged against the Union for allegedly racist behavior. This charge was not discussed in the record or made a part of the record.

activities.]; *Mississippi Transport*, 310 NLRB 1339, 1344 (1993), [*18] [" . . . employer solicitations to employees about reporting union activity if they felt 'harassed' to be unlawful because they have the potential dual effect of encouraging employees to identify union supporters based on the employees, subjective view of harassment and discouraging employees from engaging in protected activities."]; *Meisner Electric, Inc.*, 316 NLRB 597, 607 (1995), [" . . . by requesting employees who were 'harassed, by other employees advocating the Union to report it to management . . . management encourages employees to report solicitations which are subjectively offensive to them and discourage union supporters from engaging in protected activity."]; *Arcata Graphics*, 304 NLRB 541 (19-91).

3. (a) Did Respondent, on or about December 11, 1997, by its supervisor and agent Cheryl .[*19] Gonzalez, direct its employees, under explicit and implicit threat of discipline, to refrain from using the second floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees?

(b) Did on a date in January 1998, Respondent remove the second floor

pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees?

(c) Discussion of Union Objection No. 15. Did Respondent unlawfully restrict access to the facility through the use of security and electronic surveillance?

The facility has a basement and two floors. The rear entrance to the facility is on the basement level in the rear of the structure. The front entrance at the first floor level. For some time, the Respondent had a pay telephone located on the second floor near the nurses station in the unit known as skilled care I. There was also a pay phone on the first floor near or in the intermediate care unit. In late December, 1997, or early January, 1998, the second floor pay phone was removed and placed near a security guard's desk at the rear entrance of the building. When the security guard was moved to the front entrance and a video camera and intercom were installed [*20] at the rear entrance, this phone was moved to a location near the basement break room. The second floor pay phone was replaced by a phone that was exclusively for the use of residents. The phone in the intermediate care area was

moved to the front entrance at about the same time.

CNA Vanessa Veit testified that while the phone was on the second floor, employees could use it for incoming and outgoing phone calls, so long as the use of the phone by an employee did not become excessive. It was Veit's understanding that the purpose of the phone was to allow employees to make and receive calls as they were not allowed to use facility phones or resident's phones.[17] Further, if residents did not have personal phones, they too could use the pay phone. Employees were not to use the facility's phones except to receive emergency incoming calls. Employees from other units also came to the second floor to use the pay phone.

Sometime after the demand for recognition [*21] had been made and before the second floor pay phone was moved, Veit attended an employee meeting conducted by supervisor, Cheryl Gonzalez. According to Veit, Gonzalez announced that employees were not to receive personal calls on the unit, except on break or meal time. No reason was given. CNA Lisa Roberts testified that Gonzalez

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[17] Employees could receive emergency calls on facility phones.

told her and four or five other employees that she did not want any more personal calls on the pay phone. Cheryl Gonzalez testified that she did not restrict use of the pay phone except to remind employees that they were not to make or receive calls while working. However, based on her own description of what she told employees, it would be easy to interpret it as a prohibition against employees using the pay phone. In response to a question asking whether she restricted employee use of the pay phone, Gonzalez answered "Only during working hours, when they were on duty and supposed to be tending to residents, em, they were reminded not to make personal phone calls or accept personal phone calls. "I credit the employee witnesses regarding what they were told by Gonzalez. Gonzalez also testified that the pay phone had been a problem for the five years she had [*22] been a head nurse.[18]

Denise Johnson testified that employees were "re-reminded" of the Respondent's rule about phone usage in December, 1997. This rule, which appears

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[18] Lisa Roberts gave the only estimation of the frequency with which the pay phone was used, estimating it was one or two times a shift.

in Respondent's employee handbook, reads: "Personal calls are not to be made or received on duty except in an emergency. Phones at the nurses stations are not to be used at any time for personal calls. Pay phones are available for calls during break or meal times or as authorized by your supervisor."

According to Vanessa Veit, this rule was not enforced until after the meeting conducted by Gonzalez. Lisa Roberts testified similarly, noting that the pay phones could be used by employees at any time so long as the employees did not abuse the privilege. Roberts noted that she received occasional personal calls from her husband as she has four children and with her twelve hour shift, there are times when he needs to check [*23] with her. Moving the phone from the second floor was inconvenient because now the only way to reach her is by a facility phone at the nurses desk which is against rules.

Denise Johnson testified about the reason the pay phones were moved. First she suggested it was in response to some unspecified employee request and then she testified: "After we finished the full security system that involved the intercom and a buzzer, and after that was in, it was prohibited to use the phone

and have to be buzzed back in every single time to go out because it's considered a secure area out there, so because of all that, we moved the pay phones down to the locker area." I have to admit I do not understand the second reason at all. The intercom system was put in some time after the phone was initially moved.

I find that the credible evidence reveals that Respondent prior to the demand for recognition did allow employees to place and take calls at the second floor pay phone. Thus to the extent that Gonzalez announced they either could not do that any more or restricted it only to break times is a change in practice.

The Respondent's rule does not appear to have been enforced. Though Gonzalez testified [*24] that it had been a problem for five years, it was not until the Union demanded recognition that Respondent's management took any action with respect to the pay phone. I believe that it was part and parcel of Respondent's response to that action, which also included the placement of security guards at the front and back entrances, and the sudden enforcement of existing rules regarding access to the facility by off duty employees. As I

believe each of these actions, removal of the pay phones, tightening access to the facility and the placement of security guards are tied together, I will discuss these other two acts at this point in the decision. They are raised as objectionable conduct in the Union's Objection No. 15.

The Union's Objection No. 15 asserts that Respondent unlawfully restricted access to the facility through the use of security and electronic surveillance. I believe that Respondent's resort to security and limited access had its genesis in the Union's demand for recognition. on or about December 8, 1997, the Union prepared a letter addressed to Denise Johnson in which it demanded recognition. The letter was signed by the employee organizing committee and it included the [*25] signatures of a number of employees. It was hand delivered to Johnson by about ten to twelve employees and the Union's chief organizer, Andrew Tripp. These persons gathered at the back of the facility and each person took a number of Union flyers. The group then went through the facility's back door and took the elevator to the first floor and went into

Johnson's office.[19] According to Vanessa Veit, they met with Johnson and demanded recognition. She refused to grant it. Johnson asked the group to leave and they did leave her office.

Denise Johnson had a different version of what occurred. She testified that when the group of employees arrived at her office, Tripp led them in. She asked him to leave and he refused. According to Johnson the employees threw authorization [*26] cards on her desk, threw demand letters on her desk and threw stickers on her desk. They yelled and screamed at her, demanding she recognize the Union. She told them that on advice of counsel, she would not look at the cards or grant recognition. She gave them the phone number of Respondent's counsel and suggested they call. Johnson decided she would be unable to have a calm meeting with the employees so she started to leave the office. Tripp blocked her way at the door and she had to squeeze by him.

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[19] Going into the facility through the back required the group to go up the stairs to the first floor and then some distance to the office. Had they gone in through the front, they could have reached the office without going through any resident areas.

After Johnson left her office, the employees had a short meeting in the office and then went through the building handing out the demand for recognition letter to employees and speaking with residents. Tripp himself spoke with several residents and gave them a copy of the letter. Nurse Supervisor Mary Vasicko testified that on December 12, while on duty, she observed several people leave Johnson's office. Shortly thereafter, she was told the people she saw were passing out flyers. She went to check and found Tripp passing out flyers. She told him he had no right to be there and ordered him to leave. She escorted him out of the building. Tripp went to his car in the facility's back parking [*27] lot and spoke to a couple of employees who had been with the group making the recognition request. At this point the local police arrived and asked why he was still present on the property. Tripp said he was leaving. The police asked Johnson if she wanted him arrested. She said yes and they arrested him.

On the following day, Johnson prepared and had distributed to employees in the facility a letter concerning the demand. In part it states:

"I'm sure you all noticed or heard about yesterday's commotion at the

facility. An intruder was unlawfully on the premises confronting many of you, and many of the Residents. The intruder said he was from the Union and said he had a right to be here. He did not have any right to be at the facility. Although I personally asked the intruder to leave the premises, instead of honoring my request, he became belligerent to me and the office staff. I had to call the Vestal Police Department and have him removed from the premises. The Union organizer upset many of our Residents by distributing this threatening letter to them while he was trespassing in the Resident care areas. I can't believe that any of you would condone such behavior, and I've been told [*28] that many of you -- even Union supporters -- were upset that the Union organizer did this without your consent. Is this the man that you want to bind you to a contract?"

In late December 1997, Respondent prepared and distributed to employees a flyer which accuses the Union of a variety of unsavory activity at the facility including vandalism, harassment, making false statements to the public, making racist threats, purposely breaking rules, and disrupting patient care. It also announces the hiring of trained security guards.

A guard was placed at the front and rear entrances to the building. At the rear entrance, where employees entered the facility, a security door was installed that operated electronically. Employees were given electronic badges which opened the outer door. They then dealt with a guard who checked to see if they were on the day's schedule. If they were, he marked off their name on the schedule and let them pass. If their name was not on the schedule, the guard called a supervisor to see if the employee could come in. If the supervisor did not approve entry, the employee would have to leave.[20] with the addition of the guards also came a change in practice regarding [*29] admission to the facility of off-duty employees.

Respondent at all times material had in effect a written rule covering access

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[20] The addition of the security guards occurred at the end of December 1997, or in early January 1998. Later, near the election, the security guard at the rear was removed and a video camera and intercom system was installed. This allowed the guard at the front desk to cover both entrances, seeing and speaking to persons seeking entry through the rear entrance by means of the camera and intercom.

to the facility by off-duty employees. It reads: "An employee is not to enter the Facility or remain on the premises unless he or she is on duty or scheduled to work. The only exception will be if an employee has Facility business to transact or is picking up his or her paycheck." Respondent maintained another rule on this subject, which reads: "Entertaining, visitors, friends or members of family of employee while on duty" could "justify dismissal or other discipline."

According to Veit, this limited [*30] access rule was never enforced until the onset of the Union campaign. Lisa Roberts testified that before the campaign, she would visit the home with her children on holidays to take gifts to residents. After the campaign began, this ceased. An employee could only enter the building during off-duty hours to pick up a pay check. There was no showing that the other rule was ever enforced and the testimony of LPN Michele West would indicate strongly that it was not.

LPN West testified that before the campaign she entered the facility when off duty to speak with her fiancee, who also is employed by Respondent. After the campaign started, she went to the facility to speak with him and was told

by a supervisor to leave, even though she had a valid reason to be there. West was not disciplined for the attempted visit. West also testified that in the past, some family members were violently loud when visiting residents and one tried to kill her mother; yet, no security was installed until the Union campaign. In this regard, Vestal employee Kim Geertgens testified that some kids had come into the facility on several occasions to use a vending machine in the break room. She also noted that she [*31] had had her lunch stolen on one occasion and other employees had their lunches and some money stolen on occasion. Yet no security was placed in the building though these incidents were reported to management.

Denise Johnson alluded to the demand for recognition and the actions of Tripp during the demand as a reason for installing the security system. No one from management credibly countered the evidence presented by employees that the facility's practice regarding access to the facility by off-duty employees changed with the onset of the campaign. Respondent presented another reason for security, though curiously Johnson, the facility's administrator, did not testify that this reason played any part in the decision to put in security. Vestal

recreation department employee Susan Painter testified that in December, 1997 a resident expressed concern that a man and woman she did not know had approached her and wanted to take her picture. The pair explained they were doing a follow up to an earlier program. Though the two showed no identification and the resident felt uncomfortable, she allowed her picture to be taken. After the picture was taken, she asked where they were from and they [*32] would not tell her. The two were not signed in and met with no member of staff. She testified that this incident caused concern with the residents and management. I question whether Painter's alleged reason was even considered as management had not put in a security system for the thefts, visitors who behaved violently and following the attempted murder of a resident, all undenied events.

I firmly believe that all three events, the restriction on the use of and removal of the pay phones, the sudden enforcement of limited access rules and the installation of security guards were all in response to the Union's campaign and the demand for recognition. Of the three acts, only the addition of the security guards appears to me to have any reasonable basis not totally tainted by animus. It does appear to me to be a

rather massive response to the visit of Tripp, though his actions on December 8 strike me as extremely counterproductive and immature. However, as this is a facility populated by relatively captive patients, I will not second guess management's perceived need for security. Of the three acts in question at least this one has some degree of benefit for them. The other two acts [*33] however, I find are aimed entirely at either punishing the employees for the union activity at the facility or a heavy handed attempt to stifle such activity.

First, with respect to the matter of the telephone, No legitimate reason was offered for the clear change in practice with respect to its use announced by Supervisor Gonzalez. Given Gonzalez's testimony that the phone had been a problem for years, the timing of this change, coming shortly after the demand for recognition strongly suggests it was motivated out of animus to either punish employees, show them the error of their ways in supporting the Union, or as an attempt to gain surveillance of the use of the phone. Though the phone was in plain sight and perhaps hearing of the nurses station on the second floor, the nurses are not always there. By moving it to within a few feet of the guard in the basement, Respondent was assured that a

non-neutral party could overhear all conversations on the phone. Respondent points out that a more private phone was placed in the entrance vestibule and from the standpoint of being overheard, its point is valid. However, one must pass by a security guard to use this phone, so usage is still [*34] under the guard's surveillance. The movement of the basement phone to the basement staff lounge after the basement guard was removed also points to an unlawful motivation in moving the phone. If Respondent had no such motivation, why didn't it move the phone to the lounge in the first instance. I find that the abandonment of a longstanding practice of allowing fairly unfettered use of the second floor phone by employees and the sudden enforcement of a rule restricting that use, and the removal of the phone to guard station in the facility's basement were acts taken in retaliation for the employees' Union activities. As such, it violates Section 8(a)(1) of the Act. See, *Stoughton Trailers, Inc.*, 234 NLRB 1203, 1206-07 (1978); *Melody Oldsmobile -- GMC, Inc.*, 230 NLRB 440, 447 (1977); *D.V. Copying and Printing, Inc.*, 240 NLRB 1276 (1979); *Westport Transport, Inc.*, 222 NLRB 345, 352-53; *G.F. Business Equipment, Inc.*, 252 NLRB 866, 869-70 (1980); *Elizabeth Motors, -Inc.*, 252 NLRB 1148, 1152-1153 (1980). [*35]

With respect to the Respondent's no access rule, though its existence may be valid, may be nonetheless unlawful if it was either promulgated or enforced only after the advent of a union organizing campaign. *Automotive Plastic Technologies, Inc.*, 313 NLRB 462 (1993). Accordingly, if an employer maintained an otherwise valid no-access rule prior to the advent of the organizing campaign, but did not enforce it until after the campaign began, the employer will have violated Section 8(a)(1) of the Act. *Hickory Creek Nursing Home*, 295 NLRB 1144, 1149 (1989). In the instant case, the credible evidence shows that prior to the Union campaign, the no-access rule was not enforced and employees could visit residents or friends. No problems were shown to have resulted from allowing such visits. It was not until the Union attempted to organize Respondent's employees that enforcement of the rule became progressively more stringent. Specifically, soon after the Union campaign had begun, Respondent first posted security guards at employee entrances to ensure that off-duty employees were denied access. As I have previously found that posting [*36] of the guards satisfies any legitimate interests that the facility has in affording protection to residents, this enforcement of the no-access rule to off-

duty employees and the timing of the enforcement leads me to find that it was enforced to punish employees for union activity and in an attempt to restrict or chill such activity. It is therefore unlawful and the Union's objection to such conduct is well taken and the objection is sustained.

4. Did Respondent, on or about December 22, 1997, by its supervisor and agent Judy Randall, prohibit employees from attending a Union rally?

On December 22, 1997, the Union held a press conference in front of the facility. It was covered by a local TV station and a number of dignitaries were present. CNA Vanessa Veit was involved in organizing the conference.[21] It was held during her lunch break, so she went to the conference. She had been there about five minutes when she was paged back into the facility. When she returned there appeared to be no reason for the page. She asked her supervisors why she was paged and they did not know. They did tell her that Wendy Harris, who works in administration, had phoned for her and had asked if she [*37] was at lunch and

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[21] Veit had participated in the demand for recognition and was a known Union supporter.

if Veit had signed out. While she was at the conference, she saw several anti-union employees in attendance including Catherine Whipple, Shannon Watts and Todd Weidman.

LPN Catherine Gonzales testified that during her twelve hour shift, she is allowed two half hour breaks and two or three ten minute breaks. Her head nurse and supervisor was Judy Randall. During the day of December 22, Gonzales and CNAs Joanne Labbe and Todd Weidman were talking at about the time the press conference was being held. They asked Randall if they could take their break and were told, "Not at this time, because of the stuff going of outside." However, Weidman, who opposed the union was allowed to leave whereas Labbe, who supported the Union was not.

CNA Todd Weidman testified that he attended part of the conference as it occurred near his break time. According to Weidman, there is an understanding of when breaks are to be taken and that [*38] he did not ask anyone when it came time to take his break.

Supervisor Judy Randall testified that she remembered the press conference, but does not remember anyone in particular asking to go out. She

testified that the employees had their assigned break times and if it fell during the conference they could have gone to it. She testified that breaks are assigned by the employees daily assignment. She had four CNAs on the unit. One came at 5:30 am, two more at 6:30 am and one at 9:00 am. The 5:30 person would get breaks at 8:15 to 8:30 for a meal, a fifteen minute break later, another meal break in the afternoon followed by a later fifteen minute break. The breaks were staggered by the starting time of CNAs. There is no policy stating that breaks cannot be taken with permission at other than the usual times. Randall testified that during the conference a number of employees from other wings came through hers on their way to the conference.

CNA Lisa Roberts was on the Union's employee organizing committee and participated in the demand for recognition. She is a known Union supporter. She worked the day of December 22, but because she had coverage in the afternoon, she was able to leave [*39] and attend the press conference in its entirety. She testified that about twenty employees attended the conference which lasted about an hour and forty-five minutes. These employees were from most departments, including the office. She

testified that a few of the employees present were for the Union, but most in attendance were against it. Anti-union employees present included Todd Weidman (in uniform), Catherine Whipple (out of uniform). After the conference, Roberts, supervisor, Mary Miller, told her that Wendy Harris had called the unit to ask where Roberts was. Miller told her that Harris had called to make sure that she and Veit did not leave the unit. No reason was given.

I do not find the evidence with respect to Gonzalez to be conclusive. Breaks in her department appear to be relatively fixed and as Weidman's break was scheduled, there appears to be a valid reason for having other CNAs stay in place until their breaks are scheduled to provide adequate coverage. On the other hand, the action which Respondent took against Veit and attempted to take with respect to her and Roberts is both undenied and is clearly designed to interfere with their Section 7 rights. By paging Veit [*40] back into the building and by the act of Harris attempting to keep them in the building during the conference, without legitimate reason, Respondent violated Section 8(a)(1) of the Act.

5. (a) Did Respondent, on or about December 22, 1997, grant its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities?

(b) Did Respondent, on a date in January, 1998, increase the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities?

Vanessa Veit testified that in the three and a half years she worked for Respondent, it was customary for employees to receive a Christmas bonus of $25 for full-time employees and $15 for part-time employees. In 1997, the Respondent, without explanation, upped the Christmas bonus to $50. Administrator Johnson agreed that for many years, a $25 bonus had been given employees and that in 1997, the bonus was increased to $50.

During 1997 the facility was inspected by the State of New York (JHACO survey) and no deficiencies were found. The facility also had no deficiencies upon inspection by the State Department of Health. When the employees were told [*41] of the favorable inspections at a time well before Christmas, there was no mention that it might result in increased bonuses. Johnson contended that the

increased bonus was a thank you to employees for the deficiency free inspections. The results of the inspections were known by management in July. However, until this hearing, no announcement was made to employees that the bonus increase had anything to do with the inspections. In July 1997, management was considering giving gift certificates to employees as a thank you; but, again, no employee was told of this. When the bonuses were handed out, no announcement was made tying the increase bonus to the successful inspections.[22]

The Respondent also has a practice of awarding bonuses on an annual basis to employees with perfect attendance records for the year. These awards are given in a ceremony [*42] that usually takes place between Christmas and New Year's day. Until 1997, the amount of this award was $25. In 1997, this award was increased to $100. Johnson testified that the facility has had an increasing problem with absenteeism and was trying to do something positive to make good attendance more attractive to employees.

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[22] Johnson testified that a few employees asked why the bonus was increased and she told them it was in response to the inspections. None of the employees testified herein.

As with the Christmas bonus, nothing was said to employees in advance about the increase and no reason for the increase was communicated to employees.

The evidence establishes that Respondent departed from its established practice by increasing the Christmas bonus from $25 to $50 and the attendance bonus from $25 to $100. Apart from the timing of the increases, it is significant that the reasons given by Respondent were not communicated to employees. In this regard, I believe the asserted reasons are not the real reasons for the increases. Concerning the Christmas bonus, the State Health Department and JHACO surveys were completed in January and July. In addition, Respondent's July proposal for staff appreciation gifts (cash bonuses "like we do at Christmas time" or selective gifts), while approved, was not implemented at the time. Although the favorable [*43] results of the surveys were communicated to the employees, they were not told that they would receive any reward.

Similarly, with regard to the attendance bonus, in addition to the timing of its issuance, Johnson's inability to recall when she made the determination to quadruple the amount is

subject to question. Also subject to question is Respondent's asserted decision to not communicate the decision to employees prior to giving the bonuses. This secrecy defeats the asserted reason for increasing the bonus, to wit, encouraging employees to improve attendance. If they do not know that the reward for improving attendance has been increased, no incentive exists to improve attendance.

In *Dlubak Corp.*, 307 NLRB 1138, 1160-62 (1992), it was noted that the grant of benefits during an election campaign is not per se unlawful where an employer can show that its actions were governed by factors other than the election. Among the factors the Board considers are whether the employer had previously informed the employees of the change and whether the change was consistent with past practice. In Dlubak, as in the instant case, there was no evidence to corroborate [*44] the employer's claim that the benefit had actually been decided upon prior to the election campaign or that it had been previously announced. In addition, the amount of the bonus was significantly greater than amounts paid in the past. Accordingly, "whether intended by the Respondent or not, by virtue of the timing of the substantial, previously

unannounced bonus, the employees could hardly miss the message that the source of their benefits was the company, not the Union." Id. at 1162.

6. Did Respondent, on or about December 10, 1997, unlawfully impose a seven day suspension on its employee Kathleen Camp?

(a) The circumstances surrounding Camp's suspension

Kathleen Camp was employed by Vestal as a CNA from November 1996 until March 1998. She worked on a night shift from 6:30 p.m. to 6:30 a.m. Camp was a union supporter who spoke about the Union with other employees and passed out Union literature. She was suspended for a week in December 1997. The suspension arose from an incident which occurred on December 9. 1 would note that this was day following the demand for recognition. According to Camp, she reported to work that day a few minutes early. She clocked [*45] in at the timeclock in the facility's basement and went quickly to the first floor. Once there she began handing out Union literature to employees she encountered, saying, "This is our side." She testified that everyone she gave literature took it willingly and that none of her activity was witnessed

by any resident of the facility. She came across a registered nurse Pam Wike who was in the corridor outside the dementia unit, preparing a med cart.[23] Camp testified that she placed the literature on the cart, saying "This is our side. Can't leave you out." According to Camp, the employee glanced at the document and continued passing medications. Camp then went to work.

Later that evening, According to Camp, Wike questioned her about the literature that Camp had passed out earlier and about the Union. According to Camp, she asked if Camp wasn't supposed to pass out literature during break and not interfere with patient care. According to Camp, she [*46] also asked why Camp supported the Union and what good the union would do for employees. Camp answered and the conversation lasted about seven or eight minutes. Finally Camp broke off the conversation saying that she was not supposed to talk about the Union on her work time. Camp then went for a meal break.

RN Pam Wike testified that at about 6:30 pm, Camp passed her with a green piece of paper, which she placed on

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[23] Wike was new at the facility at the time and Camp did not know her.

Wike's medication cart. Camp was coming on duty at the time and in Wike's view, had begun working. Wike was dispensing medication to a resident at the time. After she had finished dispensing medications, she looked at the paper and found that it had to do with the Union. Wike went to Camp and told her that she did not know her, but that she was a RN and that she could not talk about the Union. According to Wike, Camp said she did not want Wike to think she was harassing her, and Wike assured her she was not. They then engaged in what Wike termed small talk. Wike brought the matter to the attention of management the next day and was asked to write a statement of what happened.

The following day, Camp was telephoned at home by Director of Nursing Scurry, who asked her to report [*47] to work early. When she went to the facility she was called into a meeting with Denise Johnson and her supervisor Norma Murphy. Johnson began the meeting by stating that Camp had violated Vestal's policies the previous night by handing out Union literature. She gave Camp an "Employee Warning Record" dated December 10. It states under Company Remarks: "The staff generally and each employee has been advised and warned on numerous time in writing that our Employee Rules and

Regulations prohibit solicitation in working areas and during working time.[24]

[*48]

It has been brought to my attention that you have violated this rule by soliciting and handing out non-work related documents in a work area and during working time. This conduct is unacceptable." Camp was suspended for a week.[25]

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[24] Respondent maintains a no solicitation/no distribution rule reading: solicitation or handbilling by any person who is not an employee is prohibited on premises. Employees may not engage in solicitation of any kind during their working time. Employees may not engage in distribution of any material in any working area, either before, during or after working time. Employees are prohibited from engaging in solicitation and distribution of any kind during working and non-working time in immediate Resident care areas.

[25] Johnson testified that though the suspension covers a seven calendar day period, it was only for three working days because of Camp's schedule.

(b) The evidence adduced relating to Respondent's disciplinary system

Camp told Johnson that she did not understand why she was being suspended without being first given a verbal warning and/or a written warning before a suspension. Camp understood this to be Respondent's practice with respect to discipline. On this point, CNA Vanessa Veit testified that her understanding of Respondent's disciplinary policy was that it was progressive, going from a verbal warning, to a verbal written warning, then a written warning, then after the third warning, termination. This disciplinary procedure had been explained to her by a supervisor during her orientation [*49] at Vestal. LPN Michele West was told by her supervisor when it became necessary for her to discipline an employee that the disciplinary policy was as follows: first give a verbal counseling, then give a written warning, then disciplinary action is taken on the next offense to include possible suspension or termination.

Denise Johnson testified that on December 9, it was brought to her attention that Camp had solicited a head nurse at the nurses station while the nurse was on duty. Johnson was not sure that she ever saw the flyer that Camp was

distributing. Johnson testified that under Vestal's disciplinary policy, the level of discipline depends on the perceived severity of the violation of rules. For a minor infraction, an employee is counseled by a supervisor. If the matter is more serious or is a repeated offense, the employee is given a written verbal counseling report. If the matter is a severe violation, the employee is given a written warning. Employees generally are given two written warnings before termination is considered. The Respondent has no policy regarding suspension, though they are occasionally given for absenteeism and for allegations of patient abuse. In the case [*50] of absenteeism, employees were first given verbal and written warnings. Employees under suspicion of patient mishandling or abuse are automatically suspended pending investigation.

Johnson testified that she considered Camp and all other employees to have been given a first warning about solicitation. This "warning" was her admonition to employees in meetings held in November, 1997 that they could not solicit in patient care areas on work time. No notation that this amounted to a counseling appears in any employee's personnel file. She also pointed to a December 2, 1997 letter she sent to

employees where she stated, inter alia: "All of the staff are entitled to their own opinion and should not be afraid to express it openly. However, we must remember that our issues cannot disturb our residents. Work time and work location (where residents and visitors are) may not be used to discuss union matters." Johnson believed that at the time Camp was suspended, that the facility was out of control, that employees were not obeying the solicitation rules, that there was harassment of employees occurring, and that the atmosphere was one of fear and intimidation. She had sent out a letter on December [*51] 9 which I have heretofore found to be unlawful in paragraph no. 1 above, saying much the same thing. Johnson admitted that one of the reasons for suspending Camp was to send a message to employees that management was serious about being in control. In my opinion this message that serious consequences can flow from engaging in Union activities was a followup to the message contained in the letter of the same date.

(c) Evidence adduced about solicitation allowed by Respondent

Substantial evidence was put in the record that solicitation for purposes

other than union ones were routinely allowed in work areas on work time prior to the onset of the campaign and even after it started.

Camp testified that Respondent allowed solicitation at work for non-union related activities. She remembers employees selling Tupperware, Home Interior products,[26] Popular Club products and Friendly Home products at the facility. She noted that orders for some of these catalog sales items were taken in the facility's office. She also remembered that on the same day on which she distributed literature and was suspended for it, some items ordered by an employee were being delivered in the kitchen area of the [*52] floor she worked on. She recalled seeing sales catalogs at nurses stations. The Respondent had not acted to prevent these activities prior to the Union campaign and employees had discussed and handed out order form books during work time and in work areas. Camp testified that after her suspension, she brought in a Popular

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[26] The evidence reflects that some sales of Home Interior products are done by the residents themselves as part of a recreation program for them. Other sales of these products, however, are by employees for their own gain. [*53]

Club catalog and discussed it with a supervisor on work time in a work area without discipline. Nurse Supervisor Gall Ohmer testified that in December 1997 she observed Camp on her work unit showing other employees a catalog and soliciting purchases. Ohmer pointed out to Camp she was not allowed to solicit on the units. Ohmer took her catalog and threw it away. This occurred after Camp's suspension and Ohmer felt Camp was setting her up. Ohmer did not discipline Camp for this activity. Ohmer has a policy of discarding any catalogs she finds in work areas.[27] Camp also testified that an employee brought in an order book in late January, 1988 and employees from almost all units looked through it and placed orders.

Vanessa Veit testified that employees have sold Avon products and Girl Scout cookies at the facility. She testified that sales of these products took place in work areas. With the sale of catalog items, normally the catalogs would be left at nurses stations or in the break rooms. With Girl Scout cookie sales, the employees would be approached

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[27] Ohmer admittedly "didn't make a big issue out of the catalogs" and made no attempt to find out who left the catalogs in the units.

by the employee selling the cookies. Veit herself bought Girl Scout cookies and took delivery of them on her work unit. She testified that prior to the union campaign there was no restriction on this activity. After the campaign got underway things changed. Respondent began making all sales take place in break rooms and on break time.

LPN Michele West testified that she sold Mary Kay products at work. The Assistant Director of Nurses sold Christmas wreaths and Girl Scout cookies at work on a number of occasions. These sales took place during work time in work areas.

Lisa Roberts testified that she sold Home Interior products [*54] through a catalog. Even after the campaign began she took the catalogs to work and showed them to Vestal's employees, including members of management. She also bought Girl Scout cookies in work areas before the campaign began.

The evidence also reflects that Respondent had taped to nurses desks on the units, in view of employees and residents, anti-Union material prepared by it, thereby negating its argument that is solicitation rules were designed to

protect residents from the Union "issues."[28]

(d) Conclusions with regard to Camp's suspension

The record demonstrates that Respondent discriminatorily suspended Camp for placing pro-Union literature on Wike's cart. It is clear that Respondent has consistently allowed, and its own supervisors had engaged in, a wide range of non-union related solicitations in working and patient care areas, including solicitations for such products as Tupperware, [*55] Home Interiors, Friendly Homes, Popular Club, Avon, Girl Scout cookies, Mary Kay, Dick's Club and Christmas wreaths, both prior to and subsequent to December 9. Thus it is clear to me that Respondent did not have an enforced policy with respect to solicitation in work areas on work time unrelated to the Union campaign or Union literature. Its arguments that Union literature is different from product sales is seriously undercut by evidence it not only allowed, but participated in taping such literature to nurses desks on

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[28] Vanessa Veit had observed anti-union literature taped to nurses stations. This particular material was prepared by management.

the resident units, where such literature is in plain sight of residents. Further, as more fully discussed with respect to Union's Objection No. 13, it gave aid to anti-Union activities of employee Catherine Whipple, including copying and encouraging the distribution of anti-Union literature prepared by Whipple. It also distributed Whipple's literature to all head nurses as well as other members of supervision.

Apart from the disparate enforcement of its no-solicitation rule as to pro-Union materials, it is clear that the level of discipline meted out to Camp was disproportionate to the level of the alleged offense. Respondent acknowledges, and the record indicates, [*56] that it did not make a big issue over other incidents of solicitation that were brought to its attention. Respondent failed to apply its own progressive disciplinary policy to Camp. Under this policy or practice, employees were generally given verbal counselings, verbal warnings, and up to three written warnings before serious discipline such as suspension or termination resulted. It is clear that Camp received no prior discipline. Johnson's contention that her informing employees in meetings of Respondent's no solicitation policy and a similar message in her letter of December

2, constitutes a verbal warning under the disciplinary policy is ludicrous and obviously contrived for this proceeding. Yet, even if one gave credence to Johnson's contentions in this regard, the issuance of a seven day suspension would have still been inconsistent with Respondent's disciplinary policy or practice.

Respondent's discriminatory motive against Camp is further supported by the fact that there is no evidence that her conduct in any manner interfered with residents. She asserted that no residents observed her activity on the evening she gave Wike the flyer. Wike contended she was in the presence [*57] of a resident when Camp came by. However, even crediting Wike, she testified that Camp merely placed the flyer upside down on the med cart without saying anything. Thus a resident, even an alert one, would not have any idea of what happened. Even Wike did not know what Camp had placed on her cart until she finished her rounds and took time to look at the flyer. Camp was not given the opportunity to respond to Johnson's allegations against-her in the meeting in which she was suspended. On the other hand, Wike was asked to give written documentation of her side of the story. Most significant however, is Johnson's acknowledgment that the

motivation behind Camp's suspension was "sending a message to let everyone know we were serious about being in control." I find that Respondent has admitted to singling out Camp for harsher treatment because her alleged violation of the facility's solicitation policy involved Union activity. Giving such discriminatorily motivated discipline to Camp violates Section 8(a)(1) and (3) of the Act. See, e.g., *Lucille Salter Packard Children's Hospital,* 318 NLRB 433 (1995), [employer regularly permitted nonemployee commercial [*58] organizations to solicit and distribute materials]; *Opryland Hotel,* 323 NLRB No. 127, slip op. At 7, 9 (1997), [presumptively valid no-solicitation rule must be applied uniformly, not sporadically, not springing up only when union activities began, and not singling out union activities only for enforcement]; *K & M Electronics, Inc.,* 283 NLRB 279 (1987), [selective enforcement of no-solicitation rules against employees engaging in union activity while permitting employee commercial distribution soliciting/ distribution activity]. Under a Wright Line[29] analysis, it is clear that Respondent violated the Act. General

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[29] Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980).

Counsel has demonstrated animus, union activity on the part of Camp and Respondent's knowledge of that activity. By its disparate treatment of union versus other forms of solicitation, its far harsher treatment of Camp vis a vis anyone else violating the no-solicitation rule for non-union purposes, its abandonment of its disciplinary policy and practice in Camps case, and by its own admission that by disciplining Camp that it was sending a message to employees, Respondent has demonstrated that union animus [*59] was the motivating factor in Camp's discipline. It has made no case whatsoever that it would have given Camp a suspension for any reason not motivated by animus.

7. Did Respondent, in mid-December, 1997, unlawfully promulgate and enforce by threats and discipline, a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia?

CNA Vanessa Veit worked on December 17, 1997, wearing a smock provided by Vestal and a pair of white pants she provided. on her smock, she had placed a sticker which read: "Dare to struggle, Dare to win." The sticker was about four inches long and two inches high, about the size of her name tag. According to

Veit, during her work shift, supervisors Mary Beth Vasicko and Cheryl Gonzalez took her into Gonzalez's office and asked her to remove the sticker.[30] They asserted that the stickers were upsetting the residents. Veit refused to remove it, saying that she [*60] had a right to wear it and it was not interfering with her work. The two supervisors said, "fine, and left. Later during her shift, Veit was again approached by Vasicko who again asked Veit to remove the sticker. Veit again refused and she was then threatened that if she did not remove the sticker, they would remove her from the facility. She refused and Respondent had her escorted out of the facility about five hours before her shift ended. She was not paid for this time. During the day, Veit had observed other employees with stickers on their smocks and pants. Some of the residents asked for stickers and wore them.

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[30] It is unclear to me whether Veit was wearing more than one sticker. It does not matter however as Supervisor Vasicko testified that she only observed Veit wearing one sticker, on the chest area of her smock. Veit testified that the Union also provided stickers that said, "Support Kathy", "Vote Yes", "Recognize us, 200 A Yes".

Vasicko testified that on December 17, 1997, she was making rounds and observed [*61 three employees with stickers on their uniforms. The employees were Vanessa Veit, Sheila Warmuth and Lisa Roberts. She asked them to remove the stickers. She told them that she did not think it fair for the residents to be drawn into an issue that they had nothing to do with. She again asked them to remove the stickers. Though the employees may have been wearing more than one sticker, she only observed one on each employee, in the area of the uniform where they wore their name tags. Vasicko then left: the area and returned in about 15 minutes to see if the employees had removed the tags. They had not. Sheila Warmuth asked if she could wear the sticker on her shirt, under her uniform smock. Vasicko said she could not as it might fall off when she leaned over a resident. Warmuth removed her sticker. She told the employees they could wear the stickers anywhere but patient care areas. After some more urging, Lisa Roberts removed her sticker. Veit, however, insisted she had a legal right to wear the sticker and refused to remove it. Vasicko said that she and the facility felt differently and gave Veit the option of removing the sticker or going home. Veit went home.

Lisa Roberts testified [*62] that she wore a "dare to struggle, dare to win" sticker to work. She wore it once before the election, and then for a few days surrounding the election. on the first occasion she wore it, she was told by supervisor Mary Beth Vasicko to remove it and Roberts refused. Vasicko said she had to remove the sticker because of the residents. Vasicko then threatened that she would be sent home if she did not remove the sticker. Roberts removed it. The offending sticker was affixed to her work smock. She has worn without comment stickers showing bears on her uniform on previous occasions.

The day after she was sent home, Veit reported to work, but was refused entrance by a security guard who told her she was not on the day's schedule. The guard called a supervisor who said that Veit had been removed from the schedule and she would have to leave. Veit left and later that day found a message on her answering machine from Vestal. Vasicko had called and said that a mistake had been made and to give her a call. However, by the time Veit got the message, her shift was already over. She was not paid for this day either. She reported to work on her next scheduled day and was allowed to work, sans the [*63] sticker.

Vasicko's testimony about the following day is consistent with Veit to a point. She testified that after reaching Veit's answering machine, she actually talked with Veit around ten am, about four or five hours into Veit's twelve hour shift. Veit told her in this conversation that it was too late to come in.[31] Though Vasicko testified that it was for the residents, sake she wanted the stickers removed, there is no evidence that the stickers upset residents in any way.

LPN Michele Ann West testified that on December 16, 1997, she wore "Support Kathy" and "Dare to Struggle, Dare to Win" stickers on her clothing at work. CNA Rose Torrez also wore both stickers. [*64] Her sister, CNA Yvonne Torrez wore the "Dare to Struggle, Dare to Win" sticker as did CNAs John Reese, Julia Riviera and Theresa Miller. Prior to this date, no one from management had said

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[31] This small disparity in the testimony of the two witnesses does not bear on the question of whether an unfair labor practice has been committed. It would bear only on the matter of backpay. I will defer to the backpay proceeding to decide whether Veit should be paid for the entire day or only a portion of it, when this matter can be more fully developed.

anything about the wearing of stickers. During West's shift, she was approached by Yvonne Torrez who told her that supervisor Norma Murphy was sending her home for refusing to remove her sticker. West told Torrez they did not have to remove the stickers. At this point supervisor Murphy asked if West was wearing a sticker and West showed her the ones she was wearing. Employees Reese and Rose Torrez were also present. West told the group they did not have to remove the stickers, pointing out that the employees were wearing them on personal clothing and not on the facility supplied smocks. Murphy told the group to remove the stickers or go home. West argued that she had been allowed to wear a Mary K T shirt and an Ocean City T-shirt. At about this time, Reese and Miller removed their stickers. Rose Torrez and West continued to refuse and they were sent home. The following day West called to see if she was to work and was told that she could come in, if she wore no stickers.[32]

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[32] Though West and other LPNs were subsequently determined to be supervisors, at this time she was part of the bargaining unit which the Union sought to represent.

Nurse Supervisor Norma Murphy testified on December 16, she observed Michele West and the Torrez sisters wearing stickers. According to Murphy, they each had two stickers on their smocks and two on their pants. She asked them to remove the stickers and they refused. She ordered them to leave the facility. She did not issued formal discipline over the incident.

Nothing in the Respondent's rules expressly prohibits the wearing of stickers, rather Respondent's dress code merely requires that employees dress "appropriately". Indeed, Veit testified that employees at Vestal routinely wear non-uniform items on their clothing while they work. These include angel pins, breast cancer pins, Christmas stickers, Halloween stickers, childrens' pictures, school emblems and other pins. Other employees have worn a variety of shirts that had messages or pictures on them. This has been allowed by Vestal. Veit herself wore an American flag sticker without comment. Supervisor Gail Ohmer testified that during a hot air balloon festival held annually in the area, the nursing home has a mini festival as Ohmer is a balloon enthusiast. During this mini festival, employees wear balloon t-shirts or sweatshirts [*66] instead of their regular uniforms.

I believe the evidence establishes that Respondent unlawfully suspended employees Veit and the Torrez sisters for wearing the Union related stickers and unlawfully made removal of the stickers a condition to continued employment. In this regard there is no rule prohibiting the wearing of such items. In fact, it appears that employees have routinely worn, without limitation, items such as American flags, school emblems, angel pins, Christmas and Halloween ornaments, and apparel pertaining to commercial (Mary Kay) and charitable (breast cancer awareness) causes. In addition, Respondent's contention that wearing of the Union insignia was upsetting to the residents has not been established. In this regard, it is again significant that Respondent has not prohibited the placement of anti-Union materials at the nursing station, to which residents have access, and evidently permitted residents to attend and observe the December 22 Union press conference from outside the facility.[33]

[*67]

In *St. Luke's Hospital*, 314 NLRB 434 (1994), the Board found that employees

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[33] See testimony of Todd Weidman, Tr. 545, lines 24 and 25.

were unlawfully prohibited from wearing insignia that stated, "United to Fight for our Health Plan." There, the Board noted that the wearing of the insignia constitute protected activity, the wearing of which cannot be prohibited unless the employer establishes "special circumstances" to justify the restriction. The Board found the record devoid of evidence that patients might be upset by the insignia. Finally, it was noted that the insignia were not vulgar, obscene, or disparaging. In *Holladay Park Hospital,* 262 NLRB 278, 279 (1982), the Board reasserted the proposition that "special circumstances" justifying the prohibition against wearing union insignia were necessary where the employer has discriminatorily enforced its dress code to allow employees to wear other types of insignia. See also *Shelby Memorial Home,* 305 NLRB 910, 919 (1991), [selective and disparate enforcement of uniform rule where employees were allowed to wear pins and other paraphernalia, and the "vote yes" patches were not shown to be provocative [*68] or offensive]; *St. Vincent's Hospital,* 265 NLRB 38, 42 (1982), [formal disciplinary action is not a prerequisite to finding an overly broad rule has been unlawfully enforced].

I find that Respondent has failed to show "special circumstances" where it has

allowed employees to wear other types of insignia and has not established that the Union insignia had caused, or would reasonably cause, an adverse effect on the residents, health and welfare. Nothing about the insignia involved herein is offensive, provocative, obscene or disparaging. I find that the Respondent's actions in requiring the removal of the insignia and its discipline to Veit, Yvonne and Rosanna Torrez for refusing to remove their insignia violates Section 8(a)(1) and (3) of the Act. Respondent's promulgation of this rule and making it a condition of continued employment that employees not wear such insignia also violates the Act.

8. Discussion of the Union's Objection No. 2. Did Respondent unlawfully threaten that voting for the union would inevitably result in a loss of flexibility in the workplace?

In a letter from Denise Johnson to employees dated March 11, 1998, she wrote:

"You see, [*69] the point behind unions is that, although they say that they will equalize the workplace, what that really means is that you will no longer have the option to individually work out issues that affect you

personally, like needing flexibility in the work times so you can take care of your family."

Threats to impose more onerous working conditions should employees choose to be represented by a union are violative of the Act. *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995). This rule has been found to prohibit statements suggesting that, if the union were to succeed, the employees would suffer a loss of flexibility in work schedules. In *Allegheny Ludlum,* a supervisor explained to a unit employee that, under a union contract, employees would lose the "flexibility" currently afforded by the Employers policy of allowing employees to "set up doctor's appointments during work time [and] to take half-day or 1 day vacations at a time. Id. At 488. The ALJ held that the threat to discontinue the existing informal policy of flexibility constituted an unlawful threat to impose more onerous working conditions. The Board expressly adopted [*70] the AIJ's findings in this regard, concluding that "the threatened loss of flexibility was unlawful." Id at 484. I find the Union's Objection No. 2 to be meritorious.

9. Discussion of the Union's Objections No. 11 and No. 17. Did Respondent unlawfully solicit grievances

from employees and did it promise to return within one week of the election to "fix all the problems?

All of the evidence relating to these two objections arose out of a series of meetings conducted with employees by Vestal's owner, Tony Salerno. In each of these meeting, Salerno introduced himself and gave a brief history of his involvement in the nursing home business. There is no question in my mind that at these meeting, regardless of the language remembered by witnesses, Salerno asked to hear employee problems or issues and did so. He thereafter, depending upon whose testimony one believes, either promised to fix them if the employees voted no in the election or promised to solve or fix these problems regardless of the outcome of the election.

CNA Kim Geertgens testified that at meeting of employees, Salerno listened as the employees told them of their problems and why they wanted a [*71] union. The employees mentioned that the length of the shifts made it difficult to find baby sitters. They complained of a lack of communication with management. According to Geertgens, Salerno replied to these complaints by saying, "if you vote no he would come back the following Friday

after the election and help fix all our problems."

Unit Secretary Wanda Griffis testified that she attended a meeting conducted by Salerno. According to Griffis, Salerno talked about the Union, about his history with nursing homes and that a union he had been a member of was not the greatest. She did not recall him saying that if employees voted no, he would come back and fix their problems. on the other hand, the meeting Griffis attended does not appear to be the one Geertgens attended.

Vestal's Rehab secretary Jo-Ann Barnhart testified that she attended a meeting where Salerno spoke. She testified that he opened the meeting and gave the employees some personal history. He then said he wanted to know and to discuss staff hours and other problems at the nursing center at the time. She testified that he just wanted an open forum and wanted some feedback as to what employees felt were problem. She did [*72] not remember him saying he would come back to the facility and solve the problems if the employees voted no. She testified that Kim Geertgens was at the meeting she attended. Barnhart did remember Salerno saying that whatever the outcome of the election, the employees,

problems had to be solved or needed to be fixed.

CNA Gloria Gilbride testified that she attended a meeting with Salerno, evidently the one Geertgens attended. She remembers Salerno saying he realized that there were a lot of problems and he would be taking care of them eventually. She did not hear him say that if the employees voted no, he would come back and fix the problems. She said that most of the meeting, employees just gave him their complaints.

Rehab nurse Jean Leonard testified that she attended a meeting with Salerno and did not remember him saying that if the employees voted no, he would come back and fix the problems.

Rehab aide Genie Wilson testified that Salerno talked with the employees about the problems everyone thought were happening. He wanted to know how the employees felt and wanted them to let out what they were feeling.

Employee Janet Whitmore attended a Salerno meeting. She testified that the [*73] meeting was to let Salerno introduce himself to employees whom had not met him and to let him hear any agendas that they might have in the

upcoming election. She testified that he did not say that if the employees voted against the Union, he would come back and fix the problems. She remembered employees sharing their problems with him. Speaking about these problems, she recalled that he said that there were things that needed to be fixed and that regardless of the outcome of the election, they would have to be fixed.

Several of the witnesses called herein attended the same meeting as Geertgens and did not recall Salerno saying that if the employees voted against the union, he would come back the week after the election and fix their problems. As they appeared as credible as Geertgens and as employees in such meetings often come away thinking they heard something they did not, I will not credit the exact language Geertgens quoted. On the other hand, it is clear from the preponderance of this evidence, that Salerno solicited employee grievances and problems, and promised to solve them, thereby negating any need for a union. It has long been recognized that the bestowal of benefits during [*74] an organizational campaign can be as coercive as a threat. It follows that, in addition to the actual grant of benefits, the promise of improved benefits in order to discourage employees from selecting

the union is equally violative of the Act. *Medical Center of Ocean County*, 315 NLRB 1150, 1153 (1994). There need not be an express promise to take corrective action on the basis of information obtained nor an explicit link between the solicitation and unionization. Instead, where the solicitation of grievances was not made in accordance with a well established and consistent employer policy of doing so, there is a compelling inference that [the employer] is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary. *Kmart Corp.*, 316 NLRB 1175, 1177 (1995), quoting *Reliance Electric Co.*, 191 NLRB 44, 6 (1971); see also, *House of Raeford Farms*, 308 NLRB 568, 569 (1992).

An employer may rebut this inference [*75] by showing that it maintained a regular practice of soliciting employee grievances established prior to the onset of the union's organizational campaign. However, a showing that only one verified employee meeting was held and "possibly several others at most", is insufficient to establish such a regular practice. House of *Raeford Farms, supra* at 569. Furthermore, even if the employer can

show that it had a regular practice of holding employee meetings, the employer must also show that grievances were customarily solicited during those meetings. *Kmart Corp., supra* at 1177. The employer may also present evidence that directly rebuts the inference that it promised to remedy those grievances it solicited, e.g. explicit caveat that it was making no promises following the solicitation. *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

As applied to the instant case, this precedent compels a finding that Salerno's speeches during the captive audience meetings were objectionable. During these meetings, Salerno openly solicited employee complaints, and openly promised to solve them. This type of solicitation of [*76] grievances during employee meetings conducted by the owner himself, were unprecedented. The evidence shows that Salerno attended only one meeting previously. The purpose of that single meeting was merely to introduce himself to new employees, not to provide a forum to air employee complaints. This does not constitute a regular practice, much less a regular practice of soliciting employee complaints.

Salerno not only did not fail to add a caveat that he could make no promises,

but to the contrary, expressly promised to remedy grievances. I find that the Union's Objection No. 17 is meritorious and find that Objection No. 11 lacks merit, because of my credibility finding above.

10. Discussion of Union Objection No. 12. Did Respondent unlawfully threaten that voting for the Union would inevitably result in employees being forced to strike or lose benefits?

Vanessa Veit testified that she attended meetings where Denise Johnson indicated to employees that strikes are inevitable. Veit challenged this assertion, saying to Johnson that employees decided whether or not they wanted to strike. Johnson countered saying that the Union made this decision. Veit replied that it took a vote of sixty [*77] or seventy five percent of the employees to authorize a strike. Veit testified that she attended four such employee meetings and Johnson talked about strikes at three of them. According to Veit, all of these meetings took place before a demand for recognition was made.

Lisa Roberts attended a meeting with employees and Denise Johnson. She remembers Johnson telling the employees that in negotiations, if the union did

not agree with the employer's proposed contract, it could strike until it got a contract it liked.

About a month before the election, Respondent prepared and distributed to employees a flyer which states, inter alia: "If the management cannot meet the SEIU demands in negotiation there is no agency or person who can force a settlement -- that's the law. The SEIU will make you strike and risk your jobs -- that's the facts."

In another letter to employees from Denise Johnson, dated March 11, 1998, she wrote:

"The only thing any union can do is ask management for what it wants and strike if it doesn't get it." Later in the letter, she added: "Another thing this union can just about guarantee is that they will force you to strike if their demands are not met. That is the SEIU [*78] track record -- making demands that cannot be met, then forcing members to strike and those wages and benefits that no future increase could ever make up for."

CNA Lorraine McLean testified that she attended a meeting conducted by Denise Johnson. According to McLean,

Johnson told the employees present that "the Union couldn't guarantee [employees] anything. That the only alternative that the union has when management and the union sit down is to strike." This meeting occurred near the end of the organizing campaign. In this meeting McLean pointed out that there were alternatives including arbitration and mediation.

Susan Painter testified that at one of the employee meetings, Denise Johnson said that "strikes are possible."

CN Cheryl Hopkins testified that she attended two group meetings conducted by Johnson. Hopkins recalls Johnson saying the employees could be forced to go on strike by the Union.

Based on the evidence submitted, I find that Respondent, through Johnson in employee meetings and letters to employees, did threaten clearly that voting for the union would inevitably result in employees being forced to strike or lose benefits. It is clear that predicting the inevitability [*79] of strikes is unlawful. The rationale underlying this rule is that such statements carry with them the inference that "no matter how negotiations progressed and no matter what the Union

sought from [the employer] the employees would nevertheless have to strike to obtain a contract." *Heartland of Lansing Nursing Home,* 307 NLRB 152, 158 (1992), quoting *Devon Gables Lodge & Apartments,* 237 NLRB 775, 776 (1978); see also, *Pyramid Management Group, Inc.,* 318 NLRB 607, 608 (1995). In essence the employer is threatening that, if the employees choose to be represented by a union, it will refuse to bargain in good faith, thereby creating the impression that the employer's own intransigence would render unionization futile. Id. In the absence of affirmative assurances that the employer will bargain in good faith, warnings that strikes are inevitable are considered to be anticipatory refusals to bargain in good faith and, therefore, violate the Act. 1998 *NLRB* LEXIS 50, *13 (1998).

A similar rationale has been applied to statements that the only recourse available to a union [*80] in order to gain concessions is the strike. As the Board stated in *Fred Wilkinson Associates, Inc.,* 297 NLRB 737, (1990), quoting *Amerace Corp,* 217 NLRB 850 (1975),at 852:

"In arguing against unionization, an employer is free to discuss rationally the potency of strikes as a weapon and

the effectiveness of the union seeking to represent his employees. It is, however, a different matter when the employer leads the employees to believe that they must strike in order to get concessions. A major presupposition of the concept of collective bargaining is that minds can be changed by discussion, and that skilled rational, cogent argument can produce change without the necessity for striking . . . . Employees should not be lead to believe, before voting that their choice is simply between no union and striking."

Accordingly, the Board in Fred Wilkinson Associates held that the statement: "the only thing [the Union] can guarantee is a strike. In fact the only thing the [Union] can do is to get the company to agree to its demands is to call a strike," contained in a memorandum to employees was, standing alone, sufficient to [*81] set aside the election. Id.

The unlawful effect of such statements are exacerbated when joined with a statement explaining that the employer cannot be legally compelled to concede to any demands made by the Union. *Seville Flexpack Corp.*, 288 NLRB 518, 534 (1988),["the union can make all the demands it wants, BUT WE DO NOT HAVE TO

AGREE TO A THING. The fact of the matter is that when the company makes a final offer, the union has, in reality, two choices. It can accept the offer or strike" was an unlawful act of futility.] Under this standard each of the aforementioned statements were objectionable. Johnson's direct admonition that "strikes are inevitable" is the paradigmatic threat and, as such, is unlawful. *Healthcare and Retirement Corp. of America, supra.* [Threat that "if the Union in a strike was inevitable", violated Section 8(a)(1)]. The only slightly more subtle statements contained in her March 11, 1998 memorandum that "the only thing any union can do is ask management for what it wants and strike if it doesn't get it" and her verbal admonition that the Union could not guarantee anything and that "the only alternative [*82] that the Union has when management and the Union sits down is strike" are equally unlawful declarations under *Fred Wilkinson Associates, supra.* Finally, in her written warning that "there is no agency or person who can force a settlement -- that's the law. The SEIU will make you strike and risk your jobs -- that's the Facts" is clearly similar to the statements found unlawful in *Seville Flexpack, supra.* I find the Union's Objection No. 12 meritorious.

11. Discussion of Union Objection Nos. 13 and 18. Did Respondent unlawfully create and assist an anti-union employee organization called "VNC Committee to Stop SEIU" by producing literature, paying employees to engage in anti-union activity, providing phone lists and use of facility copy equipment, telephones, etc. to conduct anti-union activity, and did Respondent unlawfully solicit revocations of union representation cards.

Union Objection Nos. 13 and 18 will be discussed together as they both relate to alleged unlawful activity on the part of Respondent in its interaction with employees opposing the Union.

(a) Catherine Whipple Related Activities

Objection No. 13 primarily [*83] deals with the activity of CNA Catherine Whipple, who opposed the Union organizing campaign actively throughout and Respondent's actions in support of her efforts.[34] Whipple wrote two open letters

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[34] One element of this objection is the Union's contention that Respondent's attorney either prepared, had prepared or supplied information to Whipple so she

(continued...)

opposing the union. She also spoke to employees about her feelings when asked. When she drafted her first letter, she spoke to Denise Johnson about it. She asked about distributing it and Johnson told her there was to be no solicitation on the units or any place where residents can observe the solicitation. She was directed to use the staff lounge or the smoking area outside. About a week later, Johnson told Whipple that copies of the letter had been made. Whipple asked if Johnson wanted them passed out and Johnson said she did. Whipple then placed copies of her letter on the table in the staff lounge and posted one near the time clock. Johnson also told her that she had given copies of the letter to head nurses and told them they were available in the lounge.

[*84]

Subsequently Whipple wrote another letter which she gave to Johnson. This

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(...continued)
could prepare, a sophomoric flyer attacking Union Organizer Andrew Tripp. I believe the evidence, or generally the lack thereof, on this issue make it too speculative to form the basis for any meaningful findings. Accordingly, no findings will be made.

letter was not distributed. Whipple wanted to send it to the NLRB and needed to get the Board's address from Johnson.

Whipple created the "VNC Committee to Stop SEIU" as a joke. other than herself, the committee had no members. She typed her letters on her father's computer and copied much of her material on his printer or at a drug store. She prepares at least two and perhaps three anti-union flyers which she distributed at the facility.

One of the leaflets she prepared includes cartoon drawings of "Union Boss Blake" and "Union Boss Alcoff." However, when asked, "Who is Union Boss Blake,?" Whipple responded, "It's a name I heard. I'm not quite sure. I know Alcoff. I didn't know Blake." She did not know where she had heard the name mentioned, did not know who the person was and did not know what the person's first name is. The name Blake was not included on any of the literature produced by the Union or the Employer as introduced at the hearing.

Sara Moyer worked at Vestal in January and February 1998. During her employment she received a phone call at home from Catherine Whipple. Moyer's telephone number is [*85] unlisted,

though it was in the possession of Respondent. Moyer testified that "she (Whipple) said she called pertaining to the union. well, I didn't want to verify anything that I thought pertaining to the union one way or the other because I wanted just to go and work but she stated who she was which I never even heard of." Whipple testified that she found a SEIU employee telephone list in the break room and took it. It had about twelve names on it. She called each person and told them she had found a phone list of the SEIU with their name and number on it. She told them she was getting rid of the list as soon as she notified each person named. Given the vague testimony of Moyer about what Whipple said and the absence of other testimony that Whipple engaged in calling employees about the Union, I have no basis for not crediting Whipple's explanation and I do so credit it.

On the day of the Union press conference December 22, Whipple was not on duty and attended the conference. Before it began, she entered the facility, though off duty and spent about half an hour visiting residents. No one in management asked her to leave the facility pursuant to Vestal's no access rule discussed [*86] earlier.

On the day of the election, CNA Lorraine McLean observed Whipple walking around the facility carrying a vote no sign. She was on facility property. Whipple was in uniform. Whipple was allowed to enter the facility several times during the day for water or whatever. She had worked the night shift before the election. She denied she was in uniform, but she was wearing white pants. She did not deny she entered the facility nor is there any evidence she was asked to leave even though she was not on duty. She admitted that she did not punch out until 7:30 am. Yet, sometime between 5:30 and 5:45 am, she went out into the employee parking lot and moved her car which was filled with "Vote No" signs to the front parking lot.

This occurred even though Johnson stated at the pre-election conference that no employee would be permitted to stay on the premises after voting; the guards would let them in the front door and they would be expected to vote and leave. Thus, if Whipple was entering and leaving the building throughout the day, the guards were letting her into the building even though she was not on the schedule and was not there to vote. Similarly, Whipple was permitted to pass [*87] out anti-union buttons all day.

Several employees offered hearsay evidence that Whipple passed out anti-union literature in work areas on work time. No one testified that they actually saw this happen. Some witnesses, including Whipple herself, testified she posted anti-union literature near the facility's time clock. But this was a location where pro-union literature was also posted. One witness, Vestal CNA Kim Geertgens, testified that Whipple talked to her about the union while she was working, even following her into a resident's room to continue the conversation. There was no showing, however, that any one in supervision observed this act of solicitation in a working area on working time.

I consider the matter of Respondent's assistance to Whipple to not be so significant that it would affect the election. Most of its assistance was minor or speculative. With respect to Whipple's letter, Respondent gave her several copies, but did not let her distribute them anywhere but the lounge or outside the facility. Perhaps, and I mean perhaps, it supplied her with the information necessary to prepare the flyer mentioning "Union boss Blake." But that is by no means certain, and again seems [*88] a relatively minor bit of assistance. Respondent does seem to have

allowed Whipple a level of freedom of access to the facility it denied other employees. For example, she was able to access the building when off duty, when other employees were turned away. She was able to picket all day on election day, contrary to the directions of the Administrator. Though her activities on this day were in plain sight, Johnson did not stop or punish this activity. I find the Respondent's assistance to Whipple to be de minimus and find the union's Objection No. 13 not to have merit.

(b) Respondent's Efforts to have Employees Revoke Authorization Cards

The Respondent solicited revocations of authorization cards through letters to employees, provided forms, addressed and mailed forms to the employee's homes, and addressed, stamped and mailed completed forms to the Union on the employees, behalf.

In a letter sent to employees by Vestal on December 2, 1997, employees are informed, inter alia, "You can revoke a card that you have signed by sending the union a note saying: 'I hereby revoke any authorization card given to Local 200 SEIU Date it and sign it and mail it to the union. Be sure to [*89] make a copy

for yourself. You also have the right to demand to have the card returned to YOU."

In a letter sent to employees on December 12, 1997, Denise Johnson first notes some articles in the New York City newspapers that were adverse to the Union, notes Andrew Tripp's arrest and then states: "I am sure that the SEIU organizers withhold this information about their Union when they try to push people into signing membership cards. If you signed a card without knowing all the facts and wish to revoke it, you can. You can send the enclosed card revocation to the Union, today. Be sure to keep a copy, because they may say they never got it." Enclosed with this letter was a form employees could use to revoke their authorization cards.

Similarly, in the last paragraph of a flyer prepared by Respondent entitled, "What is happening at your nursing home?" Johnson wrote:

If you signed a card -- you can revoke it. Talk to your coworkers. Ask them why this Union has to lie, threaten and coerce you, and tell them you will not support anyone who engages in these kinds of activities.

Vestal CNA Kim Geertgens testified after being told by coworker Catherine Whipple that there had been a union [*90] related near riot at the nursing home, Geertgens sought out Denise Johnson to see about revoking her authorization card. Johnson gave a form to accomplish this. Johnson said that a lot of employees were revoking their cards and asked if she could use Geertgens, name and Geertgens said she could. Johnson told her that employees Mary Cole and Whipple were opposing the union. Johnson gave Geertgens some extra revocation forms to take with her. Geertgens filled out the form in Johnson's office and did not remember leaving with it or mailing it. The revocation form filled out by Geertgens was mailed to the union in an envelope provided by Respondent and postage was paid by Respondent. Johnson denies supplying the envelopes and postage and her counsel tried to suggest that employees could have taken envelopes and used the facility's postage meter to put postage on.

Johnson's denial of providing assistance with respect to the mailing of the revocation forms is not credible, given the quantity of envelopes that contain the Vestal postage meter number and the similarity of the handwriting on each of those envelopes. See Charging

Party exhibits 15 through 20. Moreover, Johnson admitted giving [*91] revocation forms to employees Charles Partridge and Shannon Watts in her office, and both of these forms arrived at the Union in similar envelopes with Vestal's postage meter number on them. Johnson could not recall if she met with employees Amy Benjamin or Mindi McRorie;[35] however, their revocation forms arrived in Vestal postage metered envelopes with the same handwriting for the return address.

From the credible evidence I find that Respondent did address, pay for the mailing and mailed employee's revocation forms to the Union.

As a general rule, an employer may not solicit employees to revoke their authorization cards. *Uniontown Hospital Assn.*, 277 NLRB 1289, 1307 (1985). An employer may, however, advise employees that they may revoke their authorization cards, so long as the employer neither offers assistance in doing [*92] so or seeks to monitor whether employees do so nor otherwise creates an atmosphere

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[35] This person's name is spelled in a number of ways in the record. I have adopted the spelling taken from Charging Party exhibit 13, a form signed by the person.

wherein employees would tend to feel peril in refraining from revoking. *R.L. White Co., Inc.*, 262 *NLRB* 575, 576 (1982). Thus, an employer may not offer assistance to employees in revoking authorization cards in the context of other contemporaneous ULPs. *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991), [distributing a sample revocation letter to employees in the context of other unfair labor practices unlawful].[36]

[*93]

In the instant case, Respondent provided employees with unsolicited information regarding how to revoke their union cards and sample revocation forms.

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[36] See also *Chelsea Homes, Inc.*, 298 **NLRB** 813, 834 (1990) ["By providing a sample form and pre-addressed envelope to assist employees avoid the serious consequences of union authorization and membership, in the context of the unlawful campaign it was waging ... (the employer) exceeded the permissible bounds of providing ministerial or passive aid in withdrawing from union membership and actively solicited, encouraged and assisted such withdrawals in violation of its duty to avoid such interference with employee rights under Section 8(a)(1)."]

It provided envelopes, postage, and on several occasions, actually mailed the letters for the employees. Under these circumstances, Respondent's assistance in revocation was neither passive nor ministerial. *Lockwoven Co.*, 245 NLRB 1362, 1371 (1979), [providing paper, pens, envelopes and postage, as well as mailing the first batch of revocation forms, was "hardly passive" assistance.] Furthermore, this was done in the midst of an anti-union campaign marked by the commission of unfair labor practices by Respondent. In this context, Respondent's assistance can not be said to have occurred in an atmosphere free of coercion. Therefore, Respondent's conduct amounted to an unlawful solicitation of revocation. That the efforts of Respondent only resulted in about ten or eleven withdrawals, of which it assisted in mailing about half, does not diminish the unlawfulness of its efforts in this respect. I find Union objection No. 18 meritorious.

12. Discussion of Union Objection No. 14. Did Respondent unlawfully utilize [*94] a dietary supervisor as the observer for the election?

At the pre-election conference, Tammy Huling, the Respondent's observer at the election was not on the excelsior

list and the Union's observer, CNA Cheryl Hopkins, told Union organizer, Andrew Tripp, that she was a supervisor. Tripp asked Huling if she was a supervisor and she replied not usually. Tripp followed up on this question and Huling said she was a supervisor on some weekends. Though the direction of election specified that non-supervisory persons were to be observers, it was too close to the election to do anything about it. Tripp protested to the NLRB officer in charge. Hopkins testified that she based her opinion on the fact that Huling always wore a white coat and was always with the head of the Dietary Department. The evidence reflects that professional employees, technical employees and supervisors wear white coats.

Vestal's Director of Human Resources Brenda Hathaway testified that Huling is a Dietary Technician. Her job description has no supervisory duties and her place on the home's organizational chart shows no one reporting to her.

Denise Johnson introduced payroll documents for the months of February and [*95] March, 1996 that reflect that Huling was not paid for any supervisory duties during those months. Huling had served as a supervisor in the past as she worked her way up in the dietary

department. She had been a dietary aid, a prep cook, a cook and a cook supervisor. She is now considered a clinician. The last time Huling had been a supervisor was over two years before. Huling reports to the Food Service Director and shares an office with this person. No one reports to Huling. Based on Johnson's testimony, Huling's job appears to be to ensure that resident's dietary needs are met. To that end she goes throughout the facility checking their medical needs and seeing if the diet they are getting is correct, safe for them and what they want. She reports back her findings to the Food Service Director.

Huling's Employee Performance Appraisal for the Diet Technician includes a review of the job skills of "informs Food Service Director of any problems with nursing staff or any department" and "occasionally supervises dining rooms during lunch and dinner meals." Johnson credibly testified that the only problems she reports back are those dealing specifically with dietary needs of the residents. [*96] Huling was not shown to have ever performed any supervision in the dining rooms in her current job, the performance appraisal form notwithstanding.

The Union concedes that Huling is not a statutory supervisor, but contends that she is a person bargaining unit employees would perceive as one closely identified with management. The Board has held that an employer may not select a statutory supervisor or other individual who is "closely identified with management" as its election supervisor. *BCW, Inc.*, 304 NLRB 780, 780-781 (1991). Several factors cited by the Union as bearing on the decision of whether a person is "closely identified with management" are: whether the individual was considered management by other employees; the location of the individual's office and its proximity to management personnel; whether the individual reported directly to management; whether the person acted as a conduit of information to management; whether the individual ever assumed supervisory functions or responsibilities, albeit only as a substitute for an absent supervisor; and whether the employer expressed the limitations on the individual's authority to the employees;[*97] the manner in which the employee is listed in the employee manual; whether the individual performs the same functions as unit members; and whether the individual wears attire or insignia which are identified with supervisory or managerial attire.

Applying these factors rationally to the limited evidence of record, I find that Huling was not a person closely identified with management. The only person testifying that he or she considered Huling was part of supervision was Cheryl Hopkins, who based this believe on the color of the uniform worn by Huling. Employees other than managerial or supervisory wear the same white uniform worn by Huling, including technical and professional employees. Huling did share an office with the Director of Food Services, but I'm not sure how this would lead people to believe she was a supervisor. CNAs share desks with Registered Nurses and LPNs, who are supervisors. Huling did report directly to one management person, the Food Service Director. But what she reported was clinical or technical in nature and had nothing to do with supervision of employees or with employees per se. Huling was not shown to have performed any supervisory duties within any time [*98] relevant to this proceeding, and was shown to have performed bargaining unit work during that timeframe.

In all, given the unrebutted description of her job, a CNA should know that she is the person who checks on the dietary needs of the residents and tries

to make sure their diets are correct for them. No CNA or other bargaining unit employee testified that they considered Huling a supervisor or person closely identified with management nor offered any evidence which would support such a finding. I do not find that the Union's Objection No. 14 has merit.

13. Discussion of Union Objection No. 16. Did Respondent unlawfully threaten employees that they would not receive a scheduled pay increase as a result of the union organizing campaign.

Vestal has had a practice since 1994 to give across the board raises to employees. While there may have been some periods of time between raises that exceeded twelve months, all employees received across the board raises in April, 1997 and during 1996. The group has always been treated equally; if CNAs did not receive a raise in a given time period, no one else did. As of January 1998, Denise Johnson was talking with the facility's owners regarding [*99] plans for 1998, and she hoped that anniversary raises would be given for the fiscal year of April, 1998 through March 1999.

On March 13, 1998, Denise Johnson issued a "confidential" memo to all non-unit employees. It read:

"I am pleased to announce that again this year there will be across the board increases on April 1st for all management and supervisory staff and for all members of the staff who are not included in the Service and Maintenance bargaining unit. As you are aware VNC is not permitted by law to make any promises of wage increases or benefits to any members of staff who might be affected by same, prior to the SEIU Union election for the Service and Maintenance Staff on March 26th. And VNC is not permitted to give or announce any increases for Service and Maintenance Bargaining Unit Staff. You are not to comment on this matter."

Lisa Roberts saw this memo lying on top of the nurses station on her wing. She was doing paperwork at the station when she saw and read it. She had never before seen a memo marked "confidential." Roberts testified that raises were not given every year. CNA Lorraine McLean also saw the document lying on a nurses desk when she went to the desk to [*100] get some paperwork she needed.

I do not find that the memo in question was intended for dissemination to affected employees and do not question that it was intended to be confidential. That some employees saw it because of careless handling of the memo by a nurse

does not make the document something that Respondent intended to get into the hands of bargaining unit employees. There is no evidence about what happened after the document was discovered by unit employees. I do not know if it was brought to the attention of management so management could respond. I do not know if it was kept a secret until the election to be used as a possible objection. Under these circumstances, I do not find that Union Objection No. 16 has merit.

C. Should the election be set aside?

In addition to the normal Board remedies for unfair labor practices, the Union urges that the election be set aside and a new election be held. I agree with this position. The test for setting aside an election is whether, under all the circumstances, an employer has engaged in conduct which could have the reasonable effect of destroying the "laboratory conditions" necessary to ensure that employees have the opportunity to [*101] make an "uninhibited" choice of a bargaining representative. General Shoe Corp., 77 NLRB 124, 127 (1948). Under this standard, conduct may be objectionable even if it is insufficiently severe to

rise to the level of an unfair labor practice. Id. At 126, 127. Accordingly, because objectionable conduct is analyzed under a more lenient standard than are unfair labor practices, it follows that a violation of Section 8(a)(1) is "a fortiori, conduct which interferes with the results of an election." Airstream, Inc., 304 NLRB 151, 152 (1991).

A finding that an employer has engaged in objectionable conduct warrants setting aside the election as tainted, "unless it is so di minimus that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election.'" Id. (citations and internal quotations omitted). In making the de minimus determination, it is proper to consider "the number of incidents, their severity, the extent of dissemination, the size of the unit and other relevant factors." Id.; see also *Waste Automation & Waste Management of Pennsylvania*, 314 NLRB 376, 376 (1993). [*102] It is worth emphasizing that the test for setting aside an election is an objective one, which considers only the conduct's reasonable "tendency" to interfere with the employees freedom of choice and to which the subjective reaction of the employees is "irrelevant." *Hopkins Nursing Care Center*, 309 NLRB 958, 958 (1992).

Looking first at the unfair labor practices,[37] I have found that Respondent violated Section 8(a)(1) by:

1. On or about November 29, 1997 and on other dates in December, 1997, at the Vestal facility and in a written communication dated December 2, 1997, by its Administrator Denise Johnson, directing employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in Union and/or protected concerted activities while at work.

2. On or about December 9, 1997, in a written communication by Johnson,

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[37] The Representation Petition was filed December 12, 1997. Under the Board's holding in *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961), objectionable conduct or unfair labor practices occurring prior to the date of the Petition cannot form the basis for setting aside an election. Such conduct, however, may be considered where it "adds meaning and dimension to related post-petition conduct." *Waste Automation & Waste Management of Pennsylvania, supra* at 376, citing *Dresser Industries*, 242 NLRB 74 (1979). I sustain all objections which are coextensive with the unfair labor practices I have found Respondent to have committed.

directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from Union supporters and to report the union and/or protected concerted activities of other employees.

3. (a) On or about December 11, 1997, by its supervisor and agent Cheryl Gonzalez, [*103] directing its employees, under explicit and implicit threat of discipline, to refrain from using the second floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

(b) on a date in January 1998, removing the second floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

4. On or about December 16, 17 and 18, 1997, promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia, directing its employees to remove union insignia from their uniforms, and in a telephone conversation, informing an employee that the employee would not be permitted to work unless the employee removed union insignia from her uniform.

5. On or about December 22, 1997, interfering with its employee's Section 7 rights by calling them back from and attempting to prohibit their attendance at a union rally.

6. (a) On or about December 22, 1997, granting its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities.

(b) In January, 1998, increasing the monetary bonus under its attendance policy, in an effort to thwart the [*104] Union's organizational activities.

I have also found that Respondent violated Section 8(a)(1) and (3) of the Act by:

1. On or about December 10, 1997, imposing a seven day suspension on its employee Kathleen Camp.

2. On or about December 16, 1997, imposing a one day suspension on its employee Rosanna [*105] Torres.

3. On or about December 16, 1997, imposing a one day suspension on its employee Yvonne Torres.

4. On or about December 17, 1997, imposing a one day suspension on its employee Vanessa Veit.

In addition to sustaining the objections which parallel the unfair labor practices I have found that Respondent committed, I have found meritorious and sustained the following objections to the election:

No. 2. The Employer unlawfully threatened that voting for the union would inevitably result in a loss of flexibility in the workplace.

No. 12. The Employer unlawfully threatened that: voting for the union would inevitably result in employees being forced to strike or lose benefits.

No. 15. The Employer unlawfully restricted access to the facility.

No. 17. The Employer unlawfully solicited grievances from employees.

No. 18. The Employer unlawfully solicited revocations of union representation cards.

In this case the number, nature, severity and circumstance of the conduct constituting unfair labor practices and

objections are more than sufficient to justify setting aside the election. When considered together, their potential effect on the laboratory conditions is indisputable. The unlawful [*106] anti-union campaign began almost at the inception of the Union's organizational campaign and continued throughout the day of the election. The nature of the unfair labor practices committed and objections found meritorious includes restrictions on employee solicitations, communications and access; various threats; granting of benefits; solicitation of grievances with the express promise to remedy them; discriminatory discipline; and solicitation of employees to revoke authorization cards and assistance in doing so. Many of them post-dated the filing of the Representation Petition and others were continuing. The majority of these violations involve the highest level of management, including the owner of the facility and its administrator. Cumulatively, they affected, in one way or another, the entire bargaining unit. Under these circumstances, the reasonable affect of these unlawful tactics on the election, which was ultimately decided by only 2 votes, was undoubtedly sufficient to justify setting aside the election as tainted.

Conclusions of Law

1. Respondent, VJNH, Inc., d/b/a vestal Nursing Center, is an employer engaged in commerce within the meaning of Section 2(2), (6) and [*107] (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, Local 200A, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described unit of employees is an appropriate unit:

All full-time and regular part-time service and maintenance employees, including all certified nursing assistants and floor aides employed at the Employer's Vestal, New York, facility; but excluding the Director of Nursing, Assistant Director of Nursing, case manager, RN Supervisors, head nurses, unit nurses, business office clerical employees, patient care coordinators, clinical coordinators, physical therapists, physical therapist assistants, social workers, music therapists, dietitians, dietary technicians, speech therapists, medical records employees, managerial employees,

professional employees, and guards and supervisors as defined in the Act.

4. The Respondent engaged in conduct in violation of Section 8(a)(1) of the Act, and to the extent objected to by the Union, objectionable conduct affecting the election, by:

(a) On or about November 29, 1997 and on other dates [*108] in December, 1997, at the Vestal facility and in a written communication dated December 2, 1997, by its Administrator Denise Johnson, directing employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in Union and/or protected concerted activities while at work.

(b) On or about December 9, 1997, in a written communication by Johnson, directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from union supporters and to report the union and/or protected concerted activities of other employees.

(c) (1) On or about December 11, 1997, by its supervisor and agent Cheryl Gonzalez, directing its employees, under explicit and implicit threat of

discipline, to refrain from using the second floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

(2) On a date in January 1998, removing the second floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.[38]

(d) On or about December 16, 17 and 18, 1997, promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia, [*109] directing its employees to remove union Insignia from their uniforms, and in a telephone conversation, informing an employee that the employee would not be permitted to work unless the employee removed union insignia from her uniform.

(e) On or about December 22, 1997, interfering with its employee's Section 7 rights by calling them back from and

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[38] This alleged unfair labor practice is coextensive with the union's Objection No. 10.

attempting to prohibit their attendance at a union rally.[39]

(f) (1) On or about December 22, 1997, granting its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities.

(2) In January, 1998, increasing the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities.[40]

[*110]

5. Respondent engaged in conduct in violation of Section B(a)(1) and (3) of the Act and in conduct objectionable to the conduct of the election by:

(a) On or about December 10, 1997, imposing a seven day suspension on its employee Kathleen Camp.

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[39] This alleged unfair labor practice is coextensive with the Union's Objection No. 5.

[40] The granting of these two benefits is also alleged as objectionable conduct in the Union's Objection No. 3.

(b) On or about December 16, 1997, imposing a one day suspension on its employee Rosanna Torres.

(c) On or about December 16, 1997, imposing a one day suspension on its employee Yvonne Torres.

(d) On or about December 17, 1997, imposing a one day suspension on its employee Vanessa Veit.

6. The Union's Objections, to the extent they are coextensive with the unfair labor practices found to have been committed above are sustained, and in addition, the Union's Objections set forth below are sustained:

No. 2. The Employer unlawfully threatened that voting for the union would inevitably result in a loss of flexibility in the workplace.

No. 12. The Employer unlawfully threatened that voting for the union would inevitably result in employees being forced to strike or lose benefits.

No. 15. The Employer unlawfully restricted access to the facility.

No. 17. The Employer unlawfully solicited grievances from employees.

No. 18. The Employer [*111] unlawfully solicited revocations of union representation cards.

7. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended employees Kathleen Camp, Yvonne Torrez, Rosanna Torrez and Vanessa Veit, it must make them whole for any loss of earnings and other benefits resulting from their suspensions, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension of Kathleen Camp and notify her in writing

that this has been done and that the suspension will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I [*112] issue the following recommended[41]

ORDER

The Respondent, VJNH, Inc., d/b/a Vestal Nursing Center, Vestal, New York, it officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Directing employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in Union and/or protected concerted activities while at work.

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[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from union supporters and to report the union and/or protected concerted activities of other employees.

(c) Eliminating a benefit or privilege previously enjoyed by employees because they engage in union or other protected concerted activities under [*113] Section 7 of the Act.

(d) Promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia, directing its employees to remove union insignia from their uniforms, and informing employees that they would not be permitted to work unless the employees removed union insignia from their uniforms.

(e) Interfering with its employee's Section 7 rights by calling them back from and attempting to prohibit their attendance at a union rally.

(f) Granting its employees the benefit of an increased holiday pay bonus and increasing the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities.

(g) Suspending or otherwise disciplining employees because of their support for the Union or because they engage in union or other protected concerted activity under Section 7 of the Act.

(h) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Within 14 days of this order, make Kathleen Camp, Yvonne Torrez, Rosanna Torrez [*114] and Vanessa Veit whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this order, remove from its files any reference to the unlawful suspension of Kathleen Camp and within 3 days thereafter, notify her in writing that this has been done and that the suspension will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.[42]

(d) Within 14 days after service by the Region, post at its facility in Vestal, New York copies of the attached notice marked "Appendix."[43] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and

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[42] General Counsel requests on brief a change in the Board's standard language. This is a matter for the Board to address and I defer to their judgment. [*116]

[43] If this order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

maintained for 60 consecutive days in conspicuous places including all [*115] places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) IT IS FURTHER ORDERED that the election held on March 26, 1998, is hereby set aside, and a new election shall be directed at such time as the Regional Director for Region 3 deems appropriate.

Dated, Washington, D.C., October 9, 1998

Wallace H. Nations, Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any, of these protected concerted activities.

WE WILL NOT direct our employees, under explicit and implicit threat of discipline, to refrain from discussing

the Union or engaging in Union [*117] and/or protected concerted activities while at work.

WE WILL NOT direct our employees, under explicit and implicit threat of discipline, to inform us of contacts from Union supporters and to report the Union and/or protected concerted activities of other employees.

WE WILL NOT eliminate a privilege or benefit previously enjoyed by our employees because they engage in Union or other protected concerted activities under Section 7 of the Act.

WE WILL NOT promulgate a policy prohibiting employees from displaying or wearing Union button, stickers or insignia, direct our employees to remove Union insignia from their uniforms, or inform our employees that they will not be allowed to work unless they remove Union insignia from their uniforms.

WE WILL NOT interfere with or restrain our employees' exercise of their Section 7 rights by calling them back from and attempting to prohibit their attendance at a Union rally.

WE WILL NOT grant our employees the benefit of an increased holiday pay bonus and increase the monetary bonus under our attendance policy in an effort to thwart the Union's organizational efforts.

WE WILL NOT suspend or other wise discipline our employees because of [*118] their support for the Union or because they engage in Union or protected concerted activity under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, make Kathleen Camp, Yvonne Torrez, Rosanna Torrez and Vanessa Veit whole for any loss of earning and other benefits resulting our discriminatory suspensions of these employees, less any net interim earnings plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful suspension of Kathleen Camp, and WE WILL, with 3 days thereafter, notify her in writing that this has been done and that the suspension will not be used against her in any way.

VJNH, INC., d/b/a VESTAL NURSING CENTER
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West [*119] Huron Street, Room 901, Buffalo, New York 14202-2387, Telephone 716-846-4951.

APRIA HEALTHCARE GROUP, INC., Respondent	)
and	) No. 32-CA-16939
TEAMSTERS LOCAL 853, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,	)
Charging Party	)
Case 32-CA-16939	)

NATIONAL LABOR RELATIONS BOARD

1999 NLRB LEXIS 577

August 12, 1999

COUNSEL:
[*1] Jo Ellen Marcotte, Esq., Oakland, California, for the General Counsel.

Mark Theodore, Esq. and Elizabeth D. Parry, Esq. (Jackson, Lewis, Schnitzler, & Krupman), San Francisco, California, for the Respondent.

ALJ: JOAN WIEDER

ALJ-DECISION:

DECISION

Statement of the Case

Joan Wieder, Administrative Law Judge. This case was tried on May 13, 1991,[1] at Oakland, California. The charge was filed by Teamsters Local 853, a/w International Brotherhood of Teamsters, AFL-CIO, (Union or Charging Party), on August 14, and was amended August 18, against Apria Healthcare Group, Inc., (Respondent). The Regional Director for Region 32, issued a complaint and notice of hearing on January 19, 1999, alleging Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act).

Specifically, the complaint asserts Respondent violated Section 8(a)(1) of the Act by: unlawfully interrogating employees: giving an employee the impression his support of the Union would be futile because [*2] "you can't win;" offering an employee unspecified benefits to discourage the employee from supporting the Union; and threatening an employee with termination if the employee persisted in engaging in Union activities. The complaint further alleges Respondent violated Section 8(a)(3) and

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[1] All dates are in 1998 unless otherwise indicated.

(1) of the Act by suspending employee Simeon Glasco on August 6, terminating Glasco on or about August 7; suspending employee Moorer on or about August 5 and discharging Moorer on or about August 20; and, failing and refusing to reinstate Glasco and Moorer, because Glasco and Moorer joined or assisted the Union or engaged in other concerted protected activities. Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent asserts its supervisors received training and would not have committed the alleged violations of Section 8(a)(1) and Glasco and Moorer were terminated for good cause, they committed infractions of Respondent's rules as well as State and Federal law which warranted their termination. Accordingly, Respondent moved the complaint be dismissed in its entirety. For the reasons stated below, this motion is [*3] denied.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, argue orally, and to file briefs. Counsel for General Counsel's request to correct transcript page 188 from "we could find them . . . to "We

could not find them . . . 11 is hereby granted.

Based upon the entire record, from my observation of the demeanor of the witnesses, most of whom were sequestered, and having considered the post-hearing briefs, I make the following:[2]

Findings of Fact

I. JURISDICTION

Based on Respondent's answer to the complaint, I find Apria Healthcare Group, Inc., meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a Delaware corporation with a corporate office in Costa Mesa, California and a branch facility in Union City, California. Respondent is engaged in the retail and non-retail [*4] provision of home healthcare services and equipment. Frank Bianchi is

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[2] I specifically discredit any testimony inconsistent with my findings.

Respondent's Senior Vice President, Human Resources; Mike Buschman, was the Union City Distribution Manager until about July 21; Garland Chambers was the Union City Warehouse Supervisor until about July 21, when he became Union City Distribution Manager; Darrell Rawlings was, at all material times, Union City Branch Manager. Respondent admits these individuals were supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of the Act.

Apria delivers home oxygen and durable medical equipment to home care clients and hospitals. As here pertinent, Respondent employed patient service technicians (PSTs), couriers and warehouse personnel who engage in receiving and stocking equipment and supplies. PSTs deliver and dispense oxygen from liquid tanker trucks and deliver durable medical equipment. Respondent's couriers also deliver durable medical equipment but they are not allowed to deliver or dispense oxygen. In August 1998, Respondent employed about seven PSTs, including Glasco and Moorer. To become a PST, the employee must possess a State Commercial Drivers License with [*5] tanker truck and hazardous materials endorsements.

The employee must pass State administered tests to obtain these endorsements.

Respondent also has a written field operations policy on hazardous materials, which reflects State and Federal requirements. To meet some of these requirements, the PSTs have shipping papers in their vehicles, which in August were called a route sheet manifest. Glasco testified he received a total of four hours of training from Respondent and there was no evidence how much, if any training Moorer received from Respondent concerning the preparation of these documents. Chambers confirmed Glasco's testimony, stating:

Their training primarily consists of, first of all, their taking the California DMV test for hazardous materials. The test states that you need to identify all oxygen aboard the shipping vessel.... Basically that consists of going through a process where we have a video training and information handouts. It's a process of about four hours that we have to do training.[3]

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[3] A copy of the videotape or a detailed description of the presentation

(continued...)

[*6]

Chambers claimed Respondent requires its PST drivers to enter on the route sheet manifest the names of the clients they are servicing, the driver performing the service, their vehicle identification, and most importantly the types of oxygen or compressed gases aboard the vehicle. Respondent, although claiming it trains its PSTs in the appropriate method of completing route sheet manifests, did not detail who trained Glasco and Moorer and, how, when and where Glasco and Moorer were trained. Respondent's Department of Transportation Specialist, Donald C. Anderson, has worked for Respondent approximately two and one-half years. Glasco commenced his employment with Respondent on June 8, 1997, and Moorer in March 1997. There is no clear evidence Anderson was working for Respondent at the time Glasco and Moorer were hired and trained as PSTs, and if he was, which employees he trained personally or had personal knowledge were appropriately trained. Thus, while Chambers claimed the PSTs were to enter their arrival and departure times on the

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(...continued)
viewed by Glasco and Moorer was not placed into evidence.

route sheet manifest, there is no evidence Glasco and/or Moorer ever received this instruction.

Chambers, who became branch distribution manager around [*7] July 17, 1998, admitted when he assumed that position: "It was pretty much in total chaos .... A lot of policies weren't being followed. Rules weren't being adhered to. Just a lot of different things going on." He informed the PSTs he was going "to start making sure that Apria policies and procedures were being followed." There is no evidence Chambers mentioned particular policies or engaged in any specific training at the time he made these statements or prior to the suspension and discharges of Glasco and Moorer. According to Chambers:

Basically I just said that, you know, we've been doing things kind of lackadaisical and basically we would have to start: adhering to Apria policy and procedures as far as filling out paperwork, making sure that paperwork was complete.

Also, concerning timekeeping, a lot of people weren't punching in and punching out. And I informed them that that was unacceptable and that they would

have to start punching in and punching out on a regular basis.

There is no evidence Chambers instructed the employees how to complete the route sheet manifest or any other documents. I do not find Chambers to be a convincing witness based solely on his demeanor, which [*8] was not convincing. Chambers did not appear to be telling the unvarnished truth. I also note he had poor recall on cross-examination and engaged in surmise and hyperbole. on occasion, his testimony was not responsive to the question and he volunteered information. Some of his testimony was elicited on direct examination through the device of leading questions. Accordingly, his testimony will be credited only where it is an admission against Respondent's interests or is credibly corroborated.

When Chambers met with the PSTs, there is no evidence he specifically instructed any of them how to fill out any of the documents required by Respondent and/or State and Federal authorities. Anderson testified he held two training session in 1998, one in June and the other in October. There was no clear and convincing evidence Glasco and Moorer attended the June session.

Respondent did not proffer any attendance records.

While Anderson claimed Glasco and Moorer attended the June meeting, Moorer and Glasco convincingly denied this claim. Anderson testified he only knew who attended from the corporate office, that 50 to 60 employees attended the June 16th training session but he did not have an [*9] independent recollection of Glasco and Moorer specifically attending the training session. Rawlings, who is not currently an employee of Respondent but at the time of Glasco's and Moorer's suspensions and discharges was Branch Manager, claimed he knew Moorer received training in how to fill out the Department of Transportation (DOT) log, but he did not claim this was at the same meeting Anderson was referencing in his testimony nor did he assert Moorer and Glasco were also trained in how to complete the route sheet manifest as an on-call employee during the meeting concerning the DOT log.

In fact there was no testimony from any of Respondent's witnesses that they personally trained Glasco and Moorer in the preparation of their paperwork or directly observed such training. on the contrary, as noted elsewhere, Chambers commented the employees were very lax in

the way they prepared their paperwork. Chambers did not claim he instructed either Glasco or Moorer concerning how to fill out route sheet manifests, work orders while on call, or DOT logs.

I find Respondent knew of Glasco's and Moorer's union organizing activity prior to the representation election. Around March 1998, Moorer, Glasco [*10] and others were discussing their dissatisfaction over certain working conditions when Moorer asked an UPS driver for the name of a union official. Moorer contacted the official, Bob Strello. The Union filed a petition seeking certification as representative of: "All full time and part time drivers, warehouse and couriers" dated April 14, 1998. Respondent admitted Glasco and Moorer were known union activists. Moorer and Glasco executed union authorization cards and solicited other employees to sign cards at Apria

Glasco and Moorer were subpoenaed to attend a Board representation hearing that was held on April 30, May 6 and 7. Moorer attended and testified at the Representation hearing. Glasco gave his subpoena to his supervisor Buschman, who told him to talk to Rawlings. Respondent informed Glasco he would not be needed to

testify at that proceeding and did not authorize Glasco's attendance.

Before the election, Moorer discussed the Union campaign with Darrell Rawlings, Mike Buschman, Frank Bianchi and Wendy Chang who supervised Respondent's union City clerical staff. An election was held and a Tally of Ballots issued July 15, indicating the Union lost the election by 19 votes against [*11] the Union and 16 votes for the Union. The Acting Regional Director for Region 32 certified the election results on July 24.

B. Alleged Violations of Section 8(a)(1)

Respondent admittedly engaged in a campaign to defeat the Union's organizing efforts and claims its efforts were lawful. Respondent, by Bianchi, conducted two employee meetings at the Union City facility. These were the first two times Bianchi visited this branch. Glasco testified Rawlings and Buschman and others he could not identify conducted a mandatory meeting where they indicated Respondent was against unionization. Respondent's representatives inquired why

the employees were seeking union representation. Glasco replied:[4]

> Working conditions is bad, our pay is low, we're working crazy hours, and we don't feel like we're getting the benefits that we need compared to all the other health insurance people that, do the same thing that we do, we wasn't making their type of money doing the same job.

Glasco made a similar statement supportive of the representation campaign at other company meetings. Also unrefuted was Glasco's testimony that at the second mandatory company meeting: "Well, you know, when we would come in for meetings Darrell Rawlings, you know, he would make comments like, Maurice and Simeon they don't like us having these meetings and give a funny smirk." Glasco also had several conversations with supervisors. One such conversation was with Rawlings after the representation hearing but before the vote. According to Glasco:

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[4] I find this unrefuted testimony further establishes Respondent had knowledge Glasco was an open and ardent union supporter.

He [Rawlings'] walked up to me and asked me what did I think of the union, you know, and I was like, you know, I felt that our working conditions is bad, and our pay is horrible. And Rawlings, he was like, well, what you guys are asking for it doesn't make -- he was like, it doesn't, you guys are not guaranteed anything. And, you know, he's like, you guys are riot guaranteed anything. And then he was like, you guys are not guaranteed anything. And then he was like, he was like, you guys are not guaranteed anything, and then he's like, looked at me like, you know, you need to stop playing these union games with us because you guys can't win.

[*13]

Glasco did not reply to these comments because Rawlings was his manager. Glasco also testified, without refutation, that Rawlings "just gave me his funny smirk again and walked off."

Rawlings did not recall having a one-on-one conversation with Glasco during the union organizing campaign. He did not specifically deny having this conversation with Glasco. He did admit participating in the Company campaign to defeat the organizing effort by going on the work floor discussing, interacting

and answering questions. He also participated in training about what he could and could not do in the company campaign. He did not recall asking Glasco what he thought about the union. I do not credit Rawlings' testimony for the reasons stated below. I further find receiving training in campaign tactics does not demonstrate adherence to such training. Moreover, the details of the training were not placed in evidence; therefore, there is no basis to assume adherence with the training would have prevented any of Respondent's supervisors from committing violations of the Act.

Shortly after the election, Glasco had a conversation with Chambers, who was his immediate supervisor at the time. Also present [*14] for this conversation were Moorer and another PST, Clark Blackmore, Blackmore is a current employee. He testified in a direct an open manner and his testimony is credited. According to Blackmore, who acted as an observer for the Union at the representation election. Chambers approached the three employees while they were on the loading dock. The employees were "down" because the Union lost the election. Blackmore and Chambers are "good friends." According to Blackmore, Chambers:

... just had mentioned at that point that, you know, that our jobs were secure, we didn't have to worry about being fired because of the union vote. Or, you know, because we wanted the union in. But that at that point we needed to just let that go and move on. That we can't really dwell on the union vote of us losing, because if not, that if we kind of continued to dwell on it, things would probably happen to where we would lose our jobs. Or, you know, something like similar to that. I can't really remember exactly what was said, but like if you let it go, you know, then you don't have to really worry about, you know, things in the future.[5]

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[5] While on cross-examination Blackmore testified less adversely to Respondent. I find his direct testimony, where he was not led, more believable. On cross-examination, Blackmore testified as follows:

> Q: And he came up and he said, hey, your jobs are secure even though you may have supported the union, something to that effect, is that correct?

(continued...)

Blackmore's testimony was convincingly corroborated by Glasco and Moorer. I find Glasco was believable. He testified with a direct and convincing mien. Glasco appeared to be trying to accurately recall events. He also demonstrated clear recall. I also generally credit Moorer's testimony based on his demeanor. He appeared to be attempting to recall events accurately. On one or two occasions, his testimony could be characterized as contradictory, but an examination of the verbiage of the questions explains much if not all of the contradictions. Also considered was the convincing corroboration of Moorer's testimony where others were party to the conversations he related. Moorer demonstrated good recall of the events.

According to Glasco:

Well, Chambers walked up to us and he was like, you know, you guys know basically to keep your mouths shut about what's, about this union stuff. Don't try

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(...continued)

A: Yes ... and that just to verify because we were feeling kind of bad, we didn't know where we actually stood, you know.

to bring it up again, or you guys going to get caught up in all the mess that's going to go around here.

Moorer testified he had two conversations with Chambers. The first conversation was at Chamber's desk in the warehouse at 11:30 a.m. As Moorer was walking toward his truck the day after the [*16] representation vote, Chambers called him over and said:

... I know you's mad about your loss, about the loss on the union votes, so that's why I talked to you yesterday. I'm like what's up. He like, I know you mad, but just be cool. If you start the union stuff back up, you know, you going to get fired, you know, you out of here.

Why, what you talking about, remember you said a lot of things going to happen there, a big things going to happen, so just be cool, you know what I'm saying. Say, you want job security, not talk about the union, try to refile or something, or talk about the union stuff, I'm out of here.

The second conversation Moorer had with Chambers was the event at the loading dock with Glasco and Blackmore. According to Moorer: "Garland Chambers told me and Simeon and Clark that, you

know, like I told you, be cool about the union stuff, you know, because your job security." When asked again what Chambers said, Moorer testified: " ... he told us, be cool about the union stuff, just, you know, don't bring it back up and our jobs are secure. If you bring it back up, you know, you're out of here, you know what I'm saying, you out the door."

Chambers admitted calling [*17] on Moorer and the warehouseman who testified at the Representation proceeding individually to talk with them in his office in July. He did not deny the group discussion with Glasco, Moorer and Blackmore. Chambers claimed morale was very low. According to Chambers, the conversation at the loading dock was as follows:

The topic of the conversation was that we all needed to put behind us whatever the union vote was, and the outcome of it, and move ahead in a more positive way in order to become a team again, to make everybody -- to bring the morale up, to get back to business as usual.

I wanted them to rest assured that in no way, whatever the outcome of the election was, would it affect our relationship or how we would do business.

I just wanted them to know that the opportunity to move forward and also to be promotable through the company was still there. And that they had the same opportunities as everyone else had, if not even more so because of their demonstrated leadership qualities.

For the previously stated reasons, I do not credit Chambers' testimony concerning his conversations with Glasco, Moorer and Blackmore. Having credited the testimony of Blackmore, a current employee, [*18] Glasco and Moorer, I find Chambers told these employees their jobs are secure as long as they no longer pursue union representation, but if they continue in their efforts to seek union representation, they would "lose [their] our jobs ..."

Moorer testified, after one of the employee meetings conducted by Bianchi near the end of the workday, he was walking past Rawlings, office, which was occupied by Rawlings, Chang and Bianchi. This event occurred after Moorer testified at the representation hearing but before the representation election. As he was walking past these supervisors to get to the employee break room, Bianchi:

Said I heard you's a ring leader. I started laughing. I came in the office, told me to come in the office. And when I came in the office Darrell was sitting in his desk, and I was standing next to Darrell. And then Frank Bianchi was in front of me. And Wendy Chang and Mike Buschman came in the room.

Moorer replied " ... I'm not the ring leader,[6] I said drivers tell me, they tell me what their problems is, and I voice they opinions." Bianchi then told Moorer "war stories about him battling the union." Specifically, Bianchi told Moorer:

About his union up [*19] in some city, might won, but it took a long time for them to negotiate, and they just gave up and left. And now if you want to be wanting something he'll take some away.

And then Darrell Rawlings said but we join the union then we got to pay initiation fees. I was like, no, we don't

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[6] I find the reference to Moorer as the ringleader establishes Respondent knew he was the principal employee force in the union organizing campaign and resort to this euphemism indicates hostility toward him for his role.

have to pay -- I said, no, not pay no initiation fees. He like, don't believe that.

And then Frank was like, you know, we all family, like, you know, handle this internal, you know what I'm saying, come talk to us, we can handle it, the problems.

And I was like, you know, whatever. And then I told Frank and Darrell that I had to go, do my route. And then I left.

Moorer also recalled Bianchi telling him he should vote no in the representation election because 11 ... the union wasn't, you know, no good. And telling some Jimmy [*20] Hoffa stories. How Jimmy Hoffa was crooked and join the crooked Teamsters." Bianchi then told Moorer: "That I should talk to Darrell Rawlings or Mike Buschman if I need anything. And I was like, all right." Bianchi denied making these comments. Chang did not appear and testify. Her absence was not explained and warrants the taking of an adverse inference.[7]

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[7] Even lacking the adverse inference drawn because of Chang's unexplained absence, I would have drawn

(continued...)

Rawlings also denied Bianchi made the comments to Moorer but testified Bianchi was initially outside his office and there was no credible claim he heard the commencement of the conversation where Moorer said the ringleader comment was made.

Specifically, Rawlings testified "From what I remember maurice had walked by my office and Frank Bianchi and he engaged in a conversation. What about, specifically I don't remember." Rawlings then claims Bianchi did not make the comments Moorer related. [*21] Rawlings then disclaims Bianchi made the ringleader and other comments. Rawlings did not appear forthright and candid. He had poor recall, was contradicted by Chambers when he claimed Chambers participated in the termination decisions concerning Glasco and Moorer, appeared to be hedging in his testimony, and engaged in surmise and hyperbole.

I credit Rawlings testimony he did not recall the conversation and discredit his assertion Bianchi did not make the

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(...continued)
the same conclusions concerning the content and purport of this conversation.

comments.[8] Contrary to Rawlings testimony, Bianchi testified the conversation with Moorer occurred in its entirety in Rawlings, office, that he was already in Rawlings office conversing

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[8] When asked if he heard what Bianchi said to Moorer outside his office he testified initially, "from what I remember Maurice had walked by my office and Frank Bianchi and he engaged in a conversation. What about, specifically I don't remember." Later, during cross-examination, Rawlings testified:

> Q: You did not hear what Mr. Bianchi and Mr. Moorer might have said outside your office, is that correct?
>
> A: I don't believe there was a discussion outside of my office. There may have been, but! -
>
> Q: You don't know?
>
> A: -- not that I recollect.
>
> Q: If there was you didn't hear it?
>
> A: That's correct.

with Rawlings and Chang when Moorer just joined the conversation. while he could not recall much of the content of the conversation, Bianchi claimed it was very informal. I do not credit Bianchi's denial. He did not appear open and straightforward. He also engaged in surmise and volunteered information. For example, he claimed he knew Moorer previously, meeting him during one of the mandatory company meetings. Then when specifically asked how he met Moorer, Bianchi said he was "just present during the meeting." When asked how he knew it was Moorer, [*22] Bianchi replied: "I didn't. I didn't know who the individuals were in the room. They didn't go around and introduce themselves. And so I didn't know the names of the individuals in the room." Thus Bianchi's testimony will be credited only where it constitutes an admission against interest or is credibly corroborated.

While it was not necessary to rely on the testimony of Tyrone Whiten to find Chambers was not believable, his [*23] testimony does support this conclusion. Whiten was a former employee of Respondent. He was not shown to have left Respondent's employ under adverse circumstances. He testified Chambers asked to talk with Moorer in January 1999. In response to this request, Moorer

called Chambers at Respondent's facility. Whiten overheard what Chambers said; as follows:

[Chambers] got on the phone and he said it seemed like he had a strong case. He said he heard that they had a strong case. He told -- I couldn't hear what Maurice was saying, but he said -- the first words he said, you want to break me off, you know, I'll be there for you. That's what he said at first.

And then I heard him say something about money, some money, like that. And then he told, I heard, like I say, it's kind of hard to only hear one --

Q: Just tell us what you heard Chambers say.

A: Right, I heard him say if you want to break me off I'll be there for you. That's what he said after he told him he had a strong case.

And then he said something about, I'm not sure exactly say, but about some money, need some money, something like that. And then he told him we would talk later, I'll get in touch -- I heard Garland say, [*24] well, I'll get in touch with you,

you know, we'll talk again later. whatever.

Then he hung up the phone with Maurice.

Moorer and Glasco corroborated Whiten's testimony. Glasco was at Moorer's parents, residence when Moorer called Chambers and Glasco and Moorer's mother listened to the conversation with Chambers. According to Glasco "[Chambers] said, you know, you guys, you know, you guys got a good case. And you know what I'm saying, for a little something something, you know, break me off a little something something, I, you know, testify in your behalf. "Moorer replied: "you know, you left us for dead, you know, you did us wrong, you left us for dead" Glasco further recalled:

And then it was like, Maurice was like, you know, what do you mean by a little something something? He was like, you know, you know, you giving me a couple dollars and I'll testify on your behalf. Q Who said that? A Garland [Chambers]. Q Okay. Was anything else said? A And at that point Maurice was like, you know, you guys, you know, you left us for dead, you like did us wrong. And he was like, well, I don't want to talk to you guys no more on this line. So I'll just give you guys a call back when I [*25] get home.

Moorer recalled the conversation as follows:

[Chambers said] you know, you got a strong case. And you break me off a little something, I'll testify for you. I'm, all right, what you mean, you don't say what you mean, break you off. If you give me some money I'll go to court and testify on your behalf because you got done wrong. And --

Q: Who's saying this last part?

A: Oh, Garland Chambers telling me this.

A: And I said -- can I say this in court?

Q: Yes.

A: I said, fuck you. You left me and my cuddy for dead. You understand? You fired us for nothing. We didn't even do nothing. Then he said, well, I'm going to get your number, I don't know, matter of fact this what happened, I said I don't like talking on these phones, because these phones is tapped. And he said, I said, he said well, I'm going to get your

> number from Ty. I'm like, no, that's all right. He like all right, and then you know what I'm saying, he hung up.

Chambers' denial he made such comments is not credited for the reasons stated previously herein. Accordingly, his testimony will be credited only when it is an admission against Respondent's interests or is credibly corroborated.

1. Analysis of Alleged [*26] 8(a)(1) Violations

Section 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . Section 8(a)(1) of the Act implements that grant by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7.]" The various comments found above to have been made by Respondent's representatives will be analyzed within this framework.

(a) Alleged Unlawful Interrogation by Rawlings.

Respondent, in addition to its unconvincing denials, argues, since Glasco was such an open union supporter, that any claimed interrogation is not coercive. As Administrative Law Judge William J. Pannier noted in *Lucky Stores, Inc. d/b/a Gemco,* 279 NLRB 1138 (1986):

Interrogation is not a per se violation of the Act. See, e.g. *General Motors Corp. v. NLRB,* 648 F. 2d 1251, 1256 (7th Cir. 1982). Nevertheless, "interrogation [*27] of employees about union activities is inherently suspect. . . ." *NLRB v. Fort Vancouver Plywood Co.,* 604 F.2d 596, fn. 1 (9th Cir. 1979). For, interrogation by an employer may be a very subtle weapon for interfering with employee rights." *Ridgewood Mfg. Co. v. NLRB,* 410 F.2d 738, 740(5th Cir. 1969), cert. denied *396 U.S. 632.* "Any interrogation by the employer relating to union matters presents an ever present: danger of coercing employees in violation of their Section 7 rights." *Texas Industries v. NLRB,* 336 F.2d 128,133 (5th Cir. 1964). "Interrogation by supervisory employees as to union sympathies carries with it at least the aroma of coercion. *Joy Silk Mills v. NLRB,* 185 F.2d 732, 740

(D.C. Cir. 1950), cert. denied 341 U.S. 914.

Interrogation poses a danger to employees, rights guaranteed by section 7 of the Act in three respects. First, when it occurs interrogation gives rise to a danger that it naturally will be followed by the commission of additional, more pernicious, unfair labor practices by the [*28] interrogating employer. That is, the information obtained as a result of the interrogation could be"potentially harmful to the employees in terms of possible Company retaliation."*TRW-United Greenfield Division v. NLRB,* 637 F.2d 410, 417 (5th Cir. 1981). "The cases in which interrogated employees have been discharged or otherwise discriminated against on the basis of information obtained through interrogation are numerous." *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358 (1949).

Second, even if the interrogating employer actually does not retaliate against employees, by committing unfair labor practices against union supporters whose identities are disclosed in the course of the interrogation, there is no way that the interrogated employees can know that they will not become the targets of subsequent unlawful conduct, at least not absent express assurances to

them by their employer. For "interrogation about union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *NLRB v. West Coast Casket Co.*, 205 F.2d902, 904 (9th Cir. 1953). [*29] Interrogated employees are left "to conjure up various images of employer retaliation," *Dubin-Haskell Linin Corp. v. NLRB*, 375 F.2d 566, 571 (4th Cir. 1967), cert. denied 3,93 U.S. 824, based on the fear "that the employer's economic power and superior position may be used to the disadvantage of the individual employees disclosed to be members of or active in the union," *Foote Bros. Gear Corp.*, 14 NLRB 1045, 154-1055 (1939). Accord: *Indianapolis Power Co.*, 25 NLRB 193, 205 (1940), enfd. as modified on other grounds 122 F.2d 757, 760 (7th Cir. 1941), cert. denied 315 U.S. 804.

Finally, wholly apart from actual acts or potential fear of retaliation arising from interrogation and the information disclosed by it, "when an employer inquires into organizational activity ... he invades the privacy in which employees are entitled to exercise the rights given to them by the Act." *NLRB v. Harry F. Berggren & Sons*, 406

F.2d 239, 244-245 (8th Cir. 1969) cert. denied 396 U.S. 623. [*30] "Inherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment, full freedom, from employer intermeddling, intrusion, or even knowledge. . . . The employer may not legally seek information on those subjects which the statute makes the sole concern of his employees." *Standard-Coosa- Thatcher Co., supra,* 85 NLRB at 1360-1361. Accord *Quemecto, Inc.,* 223 NLRB 470 (1976). Consequently, although interrogation is not a per se violation of the Act because of its potential adverse effects on the exercise of Section 7 rights by employees -- through the danger that it will lead to employer retaliation, through its natural tendency to instill employee fear of discrimination if protected activity continues to be pursued, and through its invasion of employee privacy in exercising statutory rights -- interrogation is held to be coercive, and thus unlawful not only when it is accompanied by express threats or promises, but also when "either the words themselves or the context in which they are used ... suggest an element of coercion or interference." *Midwest Stock Exchange v. NLRB,* 629 F.2d 305, 314 (3d *Cir.* 1980). [*31] That is, "the test is whether, under all the circumstances, the

interrogation reasonably tends to restrain or interfere with the employees in the exercise of their protected rights." *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1089 (9th Cir. 1977). Accord: *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 *(3d Cir.* 1980).

To make that determination -- whether or not interrogation has been coercive -- the Board and the Fifth Circuit Court of appeals look to certain criteria: (1) the history of the employer's attitude toward its employees; (2) the type of information sought or related; (the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer has a valid purpose in obtaining the information: (7) if so, whether this purpose was communicated to the employee, and; (8) whether the employer assures employees that no reprisals will be taken if they support the union. *NLRB v. Aero Corp.*, 581 F.2d 511, 514 (5th Cir. 1978).

The circumstances here require the conclusion Rawlings, interrogation of Glasco after [*32] the Board conducted a Representation hearing by directly asking him what he thought "of the union," was coercive. During the mandatory meeting Respondent conducted, it lawfully made

its opposition to the union organizing efforts of its employees clear. Where an employer interrogates an employee in an atmosphere where the employer is openly hostile to the union organizing efforts, it is coercive. *Jeffrey Mfg. Div., Etc. v. NLRB,* 654 F.2d 944, 947 n.3 (4th Cir.1981).

After Glasco replied he considered the employees working conditions to be bad, Rawlings told him Union representation does not guarantee anything and "you need to stop playing these union games with us because you guys can't win." This statement by Rawlings clearly related to Glasco the interrogation posed a threat to employees engaging in activities protected by Section 7 of the Act, and indicated Glasco's continued support of the union organizing efforts would result in retaliation. Rawlings did not assure Glasco Respondent would not retaliate against him or any other union activist.

Rawlings comments threatened unspecified reprisals for continued support of the Union's organizing campaign. [*33] Rawlings failed to proffer to Glasco, or at the instant hearing, any valid reasons for the questions and comments that would explain and legitimatize the interrogation. The interrogation clearly caused Glasco to

fear reprisal for he refrained from answering because Rawlings was his manager, the highest placed supervisor at the Union City facility. Rawlings sought Glasco out to ask his questions and make his remarks. There is no evidence Rawlings and Glasco were friends and this was normal banter or merely a casual exchange of remarks. The questions and comments were not part of another conversation from which they would derive in a natural and unthreatening way, Rawlings initiated the conversation. There is no claim the comments were made in a jocular or other manner, which ameliorated the effects of the comments. As previously noted, there was no assurance Glasco would be free from reprisals. on the contrary, reprisals for continued support of the unionization effort was inferred. Thus, considering the criteria, I conclude Rawlings remarks had "a tendency to intimidate employees in the exercise of their protected rights. . . ." *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981). [*34] That Glasco was a known union activist does not alter this conclusion. *Beverly California Corporation*, 326 No. 30 (1998).

Rawlings remark "you need to stop playing these union games with us because you guys can't win" clearly implies the

employees, selection of the Union as their collective-bargaining representative would be futile. Rawlings comments were patently not speech protected by Section 8(c) of the Act. Rawlings did not give Glasco assurances Respondent would not engage in regressive bargaining. These questions and references were reasonably calculated to create an atmosphere of futility and to discourage support for the Union, which is interference, restraint and coercion in violation of Section 8(a)(1) of the Act. *Wilson, Herman Lumber Co.*, 149 NLRB 673 (1964); *ITT Automotive, a Div. of ITT Corp.*, 324 NLRB 609.

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-620 (1969), stated the standards for balancing "an employer's Section 8(c) right - to voice any views, arguments, or opinion" in relating its position to its employees, as long as such views contain "no [*35] threat or reprisal or force or promise of benefit" in relation to the employees right to organize for mutual aid and benefit. The rights of the employer must be balanced against the rights of the employees to engage in concerted protected activity and any balancing of these respective rights must also weigh the economic dependence of the employees upon the employer and the

expected tendency of the employees to pick up intended implications by the employer of economic reprisal, which may be dismissed by a more disinterested ear.

The employer is free to communicate any view regarding unionization as long as the communication does not contain a "threat of reprisal or force or promise of benefit." Rawlings, statement was not shown to be a prediction no less a prediction based on objective fact. There was no predicate presented to find the statement a reasonable prediction. For example, there is no evidence concerning Respondent's wages and benefits compared to similar positions in union represented facilities in the area. There was no evidence such a stand was an economic necessary. There is no predicate for finding Rawlings statement a reasonable prediction. Thus, the statement must [*36] be considered retributive solely or principally because the employees selected the union as their collective-bargaining representative, which is unprotected by section 8(c) of the Act and violative of Section 8(a)(1) of the Act. Id. In this case, Rawlings pre-election questions and comments related to Glasco: "forewarned about the futility of selecting a collective-bargaining representative, employees may very well be dissuaded from exercising their

Section 7 rights. *Tube-Lok Products*, 209 NLRB 666 (1974). cf. *Sunrise Healthcare Corp.*, 320 NLRB 510 (1995). *Poly-America, Inc.*, 326 NLRB No. 88 (May 28, 1999), slip op. p.2.

(b) Bianchi's Statements to Moorer.

I find, prior to the election, Bianchi referred to Moorer as the "ringleader" of the union organizing campaign and after Moorer denied his role, but admitted his role as a conduit of employee grievances, Bianchi advised him to contact his supervisors if he "needed anything." Bianchi regaled Moorer with his past campaigns to defeat unionization efforts on of behalf Respondent and disparaged the Union with the comments about Hoffa, [*37] thus increasing the coercive nature of his comments.

As held in *Bakersfield Memorial Hospital*, 315 NLRB 596 (1985):

Like the vice inherent in an actual conferral of benefits, a promise of benefits, made in response to initiation of an organizing campaign or in anticipation of a representation election, violates the Act because, "employees are not likely to miss the inference that the source of benefits not

conferred [or promised] is also the source from which benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-410 (1964). To impress that inference on its employees, an employer's promise need not be express. As pointed out in [*Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1474 (10th Cir. 1973)] a promise that is implied is equally pernicious.

Bianchi informed Moorer Respondent is the source of benefits and implied the union is unnecessary. *Keller Columbus, Inc.*, 215 NLRB 723 (1974). This statement suggested if Moorer sought benefits directly from Respondent rather than relying on an [*38] outside representative, such requests would be granted, which is violative of Section 8(a)(1) of the Act. The comments were accompanied by suggesting Moorer vote no for the Union because: "the union wasn't, you know, no good. And telling some Jimmy Hoffa stories. How Jimmy Hoffa was crooked and join the crooked Teamsters."[9]

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[9] This disparaging of the Union was not alleged to be a violation of Section 8(a)(1) of the Act. Therefore, I have not considered whether this statement

(continued...)

Hostile references such as these in circumstances where the company related to its employees it did not want the union and referring to Moorer as the "ringleader" add to the coercive nature of the comments. *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 966 (4th Cir. 1985).

That Moorer did not seek to test this offer does not alter this conclusion. Bianchi's promise was clearly implied when he directed Moorer the employees concerns could be handled [*39] internally; to see his supervisors if he needed anything. That this implied promise was connected to the union organizing effort is demonstrated by the referencing of Moorer as the "ringleader." The evidence clearly establishes a nexus between the implied promise and Moorer's discontinuance of support for the Union. See also *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *NLRB v. Gissel Packing Co., supra* 395 U.S. 575, 617 (1969).

(c) Chambers Comments to Moorer

(...continued)
constitutes an additional violation of Section 8(a)(1) of the Act.

The day after the representation election, Chambers admittedly singled out Moorer for a conversation. During this conversation, Chambers informed Moorer if he "wanted job security" he should not discuss the union, try to refile a representation petition or engage in "union stuff." I find these comments clearly constitute a threat of termination if Moorer was to continue his efforts to obtain Union representation. Chambers made no remarks that tempered the coercive effects of his statement. These comments cannot be considered views, arguments or personnel opinions because they were accompanied by a threat of reprisal. *Michigan Timber & Truss, Inc.*, 328 NLRB No. 70 [*40] (May 21, 1999). Thus, I find Chambers' statements were coercive in violation of Section 8(a)(1) of the Act. *Elyria Foundry Co.*, 321 NLRB 1222 (1996); *NLRB v. Aerovox Corp.*, 435 F.2d 1208, 1210 (4th *Cir.* 1970).

(d) Chambers Comments to Glasco, Moorer and Blackmore

As found above, shortly after the representation election, Chambers indicated to Blackmore, Glasco and Moorer that if they continued to pursue union representation, they would lose their jobs and, if' they did not, then their

future was secure. The statements made to Blackmore, Glasco and Moorer was similar to those Chambers made to Moorer when he previously singled Moorer out to make a similar threat. As found above, such statements are coercive and violative of Section 8(a)(1) of the Act.

C. Alleged Unlawful Terminations

Both Glasco and Moorer were suspended and terminated for events that occurred the first week of August, 1998. Glasco's asserted offense occurred on August 4 and Moorer's while he was working on-call August 2 and 3. General Counsel asserts Glasco and Moorer were suspended and terminated and Respondent refused to reinstate them to their former [*41] PST positions because they joined or assisted the Union or engaged in other protected concerted activity for the purpose of collective bargaining or other mutual aid or protection in violation of Section 8(a)(3) and (1) of the Act. Respondent claims its actions were lawful, that it had legitimate business reasons for its actions, that Glasco and Moorer committed serious violations of Company policy and practice.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to . . .

tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization. An employer violates Section 8(a)(3) and (1) of the Act by discharging or taking other adverse action against an employee for engaging in protected union or other concerted activity. *NLRB v. Transportation Management*, 462 U.S. 393, 400-405 (1983).

Whether an employer's conduct violates Section 8(a)(3) of the Act depends on the employer's motive. In Transportation Management, the Supreme Court approved the test for determining unlawful motivation first discussed by the Board in *Wright Line, a Div. of Wright Line, Inc.*, 261 NLRB 1083 (1980), [*42] enforced on other grounds, 662 F.2d 89 (1st Cir. .1981) cert. denied, 455 U.S. 989 (1962). As stated in *Manno Electric, Inc.*, 321 NLRB 278-280, fn. 12 (1996):

Under [the Wright Line] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the

employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries,* [114 S.Ct. 2251, 2257-2258 (1994)], at 2258.

Among the common indicia of improper motive are the employer's expression of hostility toward employee union activity, the timing of an employer's adverse action against an employee, and the employer's reliance on pretext in justifying the adverse action. *Teamsters Local Union No. 171 v. NLRB,* 863 F.2d 946, 955-956 (D.C. Cir. 1988), cert. denied, 490 U.S. 1065 (1989). [*43]

In general, Respondent argues the requirements of State and Federal regulations mandate the preparation and retention of specified documents, particularly shipping papers, in the PSTs' vehicles. Glasco and Moorer had to read the commercial drivers, handbook to take the test and receive a commercial drivers, test and receive the hazardous materials endorsement. The handbook explains how to complete a hazardous materials manifest including the directive to identify all oxygen on the truck. While Respondent contends each PST is responsible for meeting State and Federal requirements, the handbook provides:

Drivers must have special training before they transport flammable cryogenic liquids or highway controlled quantities (HRCQ) of radioactive materials. Each driver's employer provides the training.
. . .

As noted above, Respondent failed to adduce the details of Glasco's and Moorer's training. The individual(s) responsible for their training, particularly in how to prepare the shipping papers, did not appear and testify. Their absence was unexplained. There was no mention of whether Respondent presented their PSTs in training with any written documents demonstrating specifically [*44] how to fill out route sheet manifests and DOT logs.

The handbook also notes:

Drivers to keep shipping papers for hazardous cargo in a pouch on the driver's door, or otherwise, in clear view within reach while the seat belt is fastened for driving, and on the driver's seat or pouch on the door when away from the vehicle.

Respondent used the document called a "route sheet manifest" as its shipping papers. These shipping papers must

include the description and technical name of the hazardous product, among other requirements. There was no evidence Respondent routinely or otherwise checked to insure its PSTs follow these requirements. There was no convincing evidence Respondent followed these mandates rigorously and disciplined all PSTs who violated them. As noted previously, prior to Chambers' becoming the PSTs' direct supervisor shortly before Moorer and Glasco were suspended and terminated, Respondent admitted it was very lax in enforcing its rules and regulations, including its paperwork requirements. There was no discrete event, other than the Union organizing campaign and Chambers new assignment, which would explain the change in Respondent's attitude toward the mandated paperwork. [*45] Chambers never claimed he instructed Glasco and Moorer, specifically, in what Respondent expected or how to complete the route sheet manifest and DOT log. In fact, Chambers was not shown to have been a PST and have knowledge on August 4 of how to complete a route sheet manifest and DOT log.

Respondent avers its policy requires the PST to comply with the federal shipping paper regulations but there was no evidence Glasco and Moorer received copies of this policy or were

specifically instructed about its contents. Again there was no detailed evidence Glasco and Moorer attended a class, received documents or were specifically instructed about this policy. Glasco's testimony about how he was instructed to complete the route sheet manifest was unrefuted. While Glasco admitted he was in training for about two weeks as a PST, the details of what the training involved were not placed in evidence. The only training reference was a 4-hour tape. The training period referenced by Glasco could merely be a probationary period. Glasco was not asked about the details of this training and no supervisor presented the details of Glasco's and Moorer's training. At best, Respondent made bare assertions [*46] or general claims. I find such evidence lacks the requisite specificity to be persuasive.

1. Events Involving Glasco

I find General Counsel has met his burden concerning the suspension and termination of Glasco and Moorer. Respondent knew Mocrer and Glasco were prominent in the union organizing campaign. Respondent's previously found violations of Section 8(a)(1) of the Act establishes it held hostility toward employee union activity. The timing of

the adverse action was shortly after the representation election. The issue is whether Respondent proved its affirmative defense that it would have taken the same measures if Glasco and Moorer had not engaged in protected concerted activity.

Glasco usually worked Monday through Friday from 10:00 a.m. to 6:30 p.m. Glasco routinely commenced his work day by getting work orders that detail the stops he must make that day. A request for service is received by Respondent's customer service department. A customer service representative generates the work order, which is checked by Respondent's quality assurance department to approve the customer's insurance. Then the work order goes to the dispatcher who determines which driver covers that [*47] geographical area. The work order is then placed in that driver's box.

Each PST is assigned a geographical area. Upon getting the work orders from his box, Glasco determines if any of the work orders mandate a time for service, and if not he arranges his schedule by filling out his route sheet, listing all stops with the closest first and the furthest last, listing all the customers names in order of delivery. The route sheet manifest also has a hazardous material manifest, which lists the

number, and type of oxygen cylinders as well as the amount of oxygen in the fill tank. Each PST was responsible for planning their route and recording the information required in the hazardous materials section of the route sheet manifest.

Most of Glasco's stops are to the same patients on a weekly basis. Thus, Glasco filled in the estimated time he would provide and finish the service to each client prior to commencing his route. Most of the clients were at private residences. Glasco would also check his vehicle for safety purposes as well as to insure the necessary supplies were on the truck. Each PST has an assigned truck as well as an assigned backup vehicle in the event the first truck broke [*48] down or there was another type of emergency. Each PST has the keys to both vehicles. Next, Glasco would commence his route.

On an average day, Glasco would be assigned between 12 to 14 stops. The service provided at each stop depended on the work order. Often, it involved going into the residence, getting the oxygen tank, taking the tank to the truck, filling the tank and then returning the tank to the residence. The length of time of the stop not only depends on the type

of service but also the accessibility of the tank. Some clients leave the tank on a porch, others could be on the upper level of a residence. Also, the client could have more than one tank that needed to be filled. Each stop averaged between 15-30 minutes. While waiting for a tank to be filled, according to Glasco, the PST " . . . can fill cut our manifest, you know, to the next stop, you know, what time we think we going to be there, and how much, you know, oxygen we think will they need and stuff like that. So, we can pre-write it." Also, on occasion, the client is not at home so the PST leaves a door tag and goes on to the next stop. The PSTs were expected to return to the residence twice before returning to the [*49] Union City facility. Upon returning to the Union City facility, Glasco would clean out his truck and check that it is ready for the next day. This would take between 20 to 30 minutes.

Glasco's termination was effective August 7, 1998 and his termination form was marked he was not eligible for rehire because "to many incidents over. The past couple of months." The status code for the discharge was marked "falsification"

and referenced attached paperwork.[10] The termination form was signed by Chambers, Rawlings and an individual from Respondent's Human Resources department. One of the attached documents was a memorandum dated August 5, 1998 from Buschman to Anderson with a copy to Rawlings "Re: Glasco Accident Report." The accident occurred January 15, 1998. Respondent received a letter dated February 27, 1998 and refers to an employee Mike Troy. Respondent does not have an employee named Mike Troy. Buschman indicated he contacted the law office for additional information.

[*50]

Glasco did have a non-injury fender bender on January 15, but filed an accident report. When asked in response to the February 27 letter if he had an unreported accident, he accurately

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[10] The reference to other incidents is an indication the falsification reference did not, standing alone constitute the entire reason for Respondent's decision to suspend and terminate Glasco. This supports my finding the claimed falsification, standing alone, was not the sole motivation for Glasco's and Moorer's suspensions and terminations.

replied no. Buschman told Glasco he later found the accident report Glasco said he filed immediately after the accident. The memo from Buschman does not claim Glasco failed to file an accident report or improperly denied having the accident. Glasco's unrefuted claim Buschman apologized to Glasco for asserting he failed to report the accident is unrefuted. According to Glasco, Buschman either quit or was terminated about two weeks after the election, which was a week or two before the memo dated August 5. Rawlings admitted Glasco could have timely reported the incident to Buschman.[11]

Also attached to Glasco's termination was another memo from Buschman to Anderson dated May 7, 1998. The memo referenced the [*51] January 15 accident and inferred the February 27 letter was from an attorney who also provided a police report on or about March 19, 1998. Buschman question all Apria drivers about an unreported

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[11] Respondent did not adduce any evidence concerning Buschman's whereabouts, whether he left Respondent's employ and if so, why.

accident[12], and all, including Glasco denied having an accident on that date. Buschman contacted the driver of the Other vehicle who provided a copy of a note the Apria driver provided him. After checking the route sheets for the day. Buschman determined Glasco was the driver of the vehicle. Buschman then confronted Glasco who said he did recall a minor accident. Buschman recommended Glasco go through a defensive driving training program and receive a written warning. Glasco, without refutation, claims Buschman later found the accident report he filed with the company, consonant with policy. Supporting this claim is the fact Glasco was never sent to a defensive driver training program and never received a written warning. while Rawlings claimed he reviewed Glasco's personnel file before determining what discipline, if any, to impose on Glasco, he did not claim there was any warning or other discipline resulting from the accident. Moreover, Rawlings did riot discuss the accident with Glasco [*52] at

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[12] Glasco explained Buschman inquired if he knew of any accident where a report had not been filed. Since Glasco filed such a report, he understood Buschman was referring to another incident.

any time, which indicates a cursory investigation prior to determining to suspend and terminate Glasco.

The other incident referenced in the termination form occurred on August 4. Glasco was part way through his route when the air conditioner on his truck failed. At about 4:30 or 5:00 p.m., he went back to the Union City facility and got his back up vehicle. He failed to take his route sheet manifest and work orders with him on the replacement truck. The route sheet manifest left at about 4:30 p.m. was completed with a notation of work performed after 7:00 p.m., in accordance with Glasco's practice of estimating times of service rather than recording actual times of service. It is unquestioned he completed his route that day. Glasco returned to base about 6:30 p.m. that evening, completed some paperwork and went home after [*53] clocking out.

According to Glasco's unrebutted testimony, his work orders required he pick up some durable medical equipment from a recently deceased patient's residence. His regular truck did not have sufficient room to perform this task so he returned to this residence after getting the replacement truck, which had the space to hold the equipment. Since

the new vehicle had more oxygen Glasco returned to another patient to complete filling tanks and then returned to a patients home who was absent when he first visited the residence. Respondent failed to disprove this testimony or even raise reasonable questions about its accuracy. The work order for Deveda Westmoreland supports Glasco's testimony for it contains the notation "No answer at home." Two other work order further support Glasco's testimony he returned to a patient to complete a fill for there are two work orders signed by his agent.

There was no evidence presented by Respondent Glasco could have and should have completed his route by 4:30 p.m. Respondent's dispatcher or other personnel responsible for assigning PSTs work orders did not appear and testify concerning how long it should have taken Glasco to complete the route [*54] he was assigned. Glasco explained he added time for lunch at the end of his route sheet manifest because he was told he must account for the time even though he did not take a lunch break. Respondent did not dispute this testimony. Supporting Glasco's testimony is his route sheet manifest for August 4, which has lunch listed as the last item. There was no evidence Glasco improperly filled out the Hazardous Material Manifest portion of

the route sheet manifest, or misstated mileage or quantities of liquid oxygen.[13]

Some of the work orders Glasco turned in for August 4 were not signed by the patient or guardian. Some patients did not need service as noted on some of the August 4 work orders. Glasco testified, without dispute, that some

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[13] Interestingly, Respondent's Exhibit 12, which was turned in by Glasco, on August 4, had the first page entirely filled out, including the redeliveries, mileage and hours at the bottom of the document. The route sheet manifest: attached to Glasco's termination documents Respondent's exhibit 19, does not have all the information completed on the bottom of the route sheet manifest. Also attached to these documents was a work order dated June 17, with a patient complaint that the driver never called although the instructions are "must call w/eta" and he had a bad attitude." There is no evidence this complaint was ever discussed with Glasco or that he was informed it was one of the matters Respondent considered in determining to discharge him. None of Respondent's witnesses specifically discussed this document or indicated how, if at all, it was considered in the termination decision.

patients leave their tanks outside for service and are not home at the time of the service. It was not established the unsigned work orders reflected Glasco failed to perform the claimed service. In fact, Chambers did not assert he knew, based on first hand knowledge or other demonstrated reliable sources that all the patients serviced by Glasco that day were home to sign the work order or had a responsible party at the residence to sign the work order. For example, the work order for one patient on via San Gabriel in Fremont, California notes "tank left on porch." Respondent failed to adduce any accounting evidence it was unable to collect for service performed by Glasco or Moorer because of the way the completed their work papers.

Glasco's route sheet manifest for April 17, indicates he had 15 stops which he completed at 7:00 p.m., which is similar to the time it took to complete his route on August 4, taking into account he had to return to base and change trucks. [*56] Like his route sheet manifest for August 4, the April 17 document does not have any times filled in the estimated time of arrival (ETA) column. This April 17 route sheet manifest also supports Glasco's claim he routinely throughout his employment with Respondent, put the estimated times of

arrival and departure in the arrive/depart column of the route sheet manifest rather than the ETA column.

A May 11, 1999 route sheet manifest placed in evidence by Respondent prepared by PST Bill Corry, shows an completed ETA column with different arrival and departure times. Since this document was prepared after Glasco and Moorer were terminated and there was no evidence concerning Corry's training, including the date of such training, in preparing route sheet manifests, I find this document does not demonstrate Glasco and Moorer were instructed to fill out route sheet manifests differently from Glasco's routine method.

According to Chambers' unrefuted testimony, at about 3:30 or 4:00 p.m., he and a PST lead person, Gary Glass, walked out of the warehouse onto the loading dock, chatting, when Glass noticed his old truck in the yard. When Glass became a PST lead, his truck was reassigned to Glasco. [*57] They wondered why the truck was parked in the lot and went to inspect the vehicle. When the got. to the truck, they noticed the clip board with the route sheet and work orders were in the truck. When Chambers examined the route sheet manifest, he noted it was completely filled out, with the last

departure time at 7:20 to 7:35 p.m. Chambers thought it strange to have recorded service for 7:20 to 7:35 p.m. when it was only 4:00 p.m. Chambers took the route sheet manifest and work orders, copied them and replaced them in the truck.

Glasco testified that he knew the customers he still needed to service and thus did not need the route sheet manifest and work orders to perform his job. Respondent claimed it needed the work orders signed by the clients in order to bill for the service. There was no evidence Respondent was unable to bill. The customers Glasco served after he changed trucks. Glasco also explained the work orders were signed because he had to revisit three of them to complete the requested services, as previously indicated.

Chambers then showed the copies to Rawlings. Chambers acted as if everything was normal. The following morning he checked the time clock and learned Glasco [*58] checked out at 6:56 p.m. Glasco was paid according to the time clock, not the route sheet manifest or work orders. There is no evidence he was paid for the lunchtime he clearly added to the document. There is no claim Glasco failed to work until 6:56 p.m. on August 4.

After reporting the time clock information to Rawlings, Chambers assigned the two PST leads, Ernie Caldwell and Glass to ascertain if Glasco performed the services claimed on the route sheet manifest at or near the times stated on the document. According to Chambers, the PST leads called the clients and reported that most of the times claimed for service on Glasco's route sheet manifest did not correspond to the information provided by the clients.

While Chambers testified he instructed the PSTs to fill in the arrival time at the time they arrived at the patients home and once they completed their duties to record their departure time on the route sheet manifest, there is no evidence or claim that Chambers, new to his position at the time of the Events involving Glasco and Moorer, instructed either Glasco or Moorer how to fill out the route sheet manifest. There is no evidence that any of Respondent's supervisors ever [*59] instructed either Glasco or Moorer how to fill out the route sheet manifest or related the import of the document under state and Federal regulations.

While Caldwell and Glass provided Chambers with written documentation[14] recording their telephone calls to the clients, these documents were missing, according to Respondent. Thus there was no way to ascertain who they talked to, whether it was the client or someone else who would have knowledge when the service was provided. The notes of the PST leads also contained the times, the telephoned contacts stated the service was provided. Chambers could not recall if all the customers listed on Glasco's route sheet manifest were contacted.[15]

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[14] These notes, according to Chambers, indicated who was called: "how the service went, was the service okay, did you have any problems that type of information." There is no claim the service provided was not timely or otherwise unsatisfactory.

[15] Rawlings testified initially: "I left it up to Garland to follow up on the paperwork, the goal there was to call some of these patients and find out if the times were accurate." Then he testified he remembered the PST leads called all the patients and a lot of the times did not match to Glasco's entries; on the route sheet manifest. Since Chambers was unsure

(continued...)

[*60]

Caldwell and Glass did not tell Chambers to whom they had spoken to when they performed the survey. Chambers admitted not all of Glasco's patients for the day in question were contacted. The fact there were three patients revisited on August 4 could explain some of the discrepancies but the failure to provide any of the specific information ostensibly reported by the PST leads, precludes reliance on their claimed reports. Therefore, there is no way to ascertain if a representative sample of individuals who possessed reliable information were called.[16] Chambers

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(...continued)
of the number of patients; called and the identity of the individual talked to by Respondent's PST leads, there was no reliable predicate established for Rawlings, testimony and indicates he engaged in hyperbole.

[16] Chambers testified: "When we placed the call to the customer's home, whoever answered the phone, if they had prior knowledge, we asked to speak to the patient. If the patient was not available, we made sure that the person that we did

(continued...)

admitted the Glasco and Moorer issues were the only times he was instructed to call all of a PSTs patients to verify time and quality of service. I also note Respondent failed to demonstrate it investigated Glasco's claims concerning the service he provided and when.

[*61]

The absence of this evidence renders it impossible to verify Chambers, bare claim most of the times on the route sheet manifest were incorrect. Respondent failed to call the PST leads as witnesses. Respondent failed to

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(...continued)
speak with had knowledge of the delivery. Chambers did not explain how Respondent ensured the informant had reliable information concerning the time of the delivery since he previously admitted Caldwell and Glass did not tell him who they spoke to. Chambers also admitted he did not have direct knowledge of who was called and what was said. Another example of his poor recall is his admission he could not recall if he gave specific instructions. This contradictory and tailored testimony further call into question the reliability of Chambers' testimony.

demonstrate this heresy evidence is reliable. Their absences were unexplained. There is no claim Glass and Caldwell are supervisors, thus their absences will not lead to the taking of an adverse inference.

Chambers gave Rawlings the information collected by the PST leads.[17] Chambers testified he did not make any recommendation to Rawlings concerning what discipline, if any, should be imposed on Glasco for completing his route sheet manifest in advance. Rawlings worked for Respondent about 5 years and was Chambers' direct supervisor. When Chambers reported finding Glasco's

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[17] Rawlings initially testified Chambers gave him the results of the client inquiry conducted by Glass and Caldwell then stated the PST leads personally gave him the information. This inconsistent testimony is another reason 1. find Rawlings testimony is not believable. When asked what Caldwell and Glass said to him, Rawlings said he could not recall even though he testified on direct. examination that most of the times recorded by Glasco did not match up with the reports from patients. This is another indication Rawlings engaged in hyperbole and his testimony was unreliable.

paperwork at about 4:00 p.m. on August 4, with times already filled in on the route sheet manifest he and Chambers, after consultation with the Human Resources department, decided to terminate Glasco, Chambers directly contradicted Rawlings and testified he did not participate in this decision.

[*62]

Respondent's Director of Employee Relations and Risk Management, Kathy Klein, had commenced working for Apria on August 3. Glasco's supervisors informed her they found a completed work order in his vehicle at about 4:00 p.m. that had been completed for the remainder of the work day. She determined the Respondent's policy concerning falsification and contacted the Union City supervisors. She determined falsification is considered misconduct and grounds for dismissal. There was no claim Respondent's policies dictated termination for falsification, if indeed such occurred. Klein determined because Respondent is:

so heavily regulated by Department of Transportation, FDA and other federal agencies, it's a much more complex issue when there is this kind of falsification involved. . .

Because the company has a tremendous amount of exposure, we're a federal contractor. And we could lose a lot of business. We could eventually be shut down in a particular facility because of falsification of documents.

Klein did not ask for nor ascertain Glasco's explanation. She admittedly had no knowledge or experience with Respondent's actual procedures or what instructions Glasco and Moorer had received. [*63] On occasion she seemed to tailor her testimony to favor Respondent's cause and some of her answers were not responsive to questions on cross-examination. After several questions, she admitted she did not know how similar infractions were handled in the past or how the PSTs were instructed to complete the route sheet manifest. Interestingly, she did not ascertain if there was a need to change instructions or policies to insure State and Federal requirements are met by Respondent and its personnel. Based on these factors, as well as principally her demeanor, which did not appear convincing. I do not credit Klein's testimony except where it is an admission against interest or is convincingly corroborated.

When Glasco reported to work on August 5, he was suspended. Rawlings

claims the suspension pending investigation was "because we needed to find out more information; we needed to finish our investigation; we needed to share this documentation with, all the complete documentation with our human resources to make sure that whatever decision we made was the correct one." According to Rawlings, the decision to suspend Glasco was jointly made by himself, his; boss, Mike Kuller[18] and Chambers [*64] pending conclusion of the investigation and checking with Respondent's Human Resources Department to determine if' their actions were correct. Chambers disputed this claim testifying he was not involved in the disciplinary decisions concerning Glasco.[19] If Respondent needed more

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[18] Kuller was a Regional Vice-President at the time of these events. He did not appear and testify. His absence was unexplained. Since there was no evidence he was a current employee of Respondent, no adverse inference will be drawn from his absence.

[19] Rawlings also testified: "I was there to support the distribution manager. I was there to help explain any information. But, again, most of' it was

(continued...)

information, then why did it suspend Glasco prior to the receipt Of such information. This action was not claimed to be standard operating policy.

[*65]

Rawlings maintained he recommended Glasco's termination because the information on the route sheet manifest was false and because the route sheet manifest functions as a shipping document and timesheet which the "California Highway Patrol, Department of Transportation require that this sheet be accurate in time." Glasco's August 4 route sheet manifest was not accurate, he punched out before the last service item listed on the manifest and the calls made to patients revealed the other times entered by Glasco were also inaccurate. As noted above, the claimed failure to file an accident report was another factor given by Rawlings as a basis for his termination recommendation even

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(...continued)
done by the distribution manager and the lead. So I was there in more of a support function." This again conflicts with Chambers, testimony he did not participate in the decisions to suspend and terminate Glasco.

though he also claimed he functioned merely in a "support function."

Even though Rawlings reviewed Glasco's personnel file as part of his investigation of the route sheet manifest incident and determination to terminate him, he claimed he requested Glasco be written up for not reporting an accident but did not know if he was. Rawlings also claimed he did not notice there was no write up for an unreported accident. Rawlings admitted he did not follow up with Buschman about the accident when making his decision [*66] to terminate Glasco. Buschman was no longer an employee of Respondent at that time.

Respondent admits Glasco was paid disparately based upon his time clock entry. Rawlings admits none of Respondent's supervisors spoke with Glasco until after it had determined he be terminated. While there was cursory discussion on August 5 with Chambers in which Glasco recounted his stops on August 4, when Glasco met with Chambers and Rawlings on August 7, Rawlings told him he was terminated and did not want to hear any explanation.

According to Glasco's principally uncontradicted testimony, at the time he was terminated, Rawlings stated:

. . . [it] was like, you know, you're terminated, you know, it does seem like your paperwork ain't right, but I was telling how all of us PST drivers fill out our paperwork, that's the way I was trained to do it, and -- when I first started off here. And like I never had any discrepancies about how they were before. I have never been written up for any paperwork before being wrong, of any type of nature. Have never been written up for anything at Apria ever, you know. When I was at Apria I was the third -- the second-best driver they ever had. And

[*67] And [Rawlings] was like, he really didn't want to hear what I was saying. He was like shaking his head like oh, well blowing it off like so . . . he was like, you know, he was basically like, you know, you still terminated. And whatever you got to say I really don't care.

Only after the decision to terminate him did Glasco have an opportunity to give his side of the story. Thus, there was no investigation as to the correctness of Glasco's claim he filed an accident report or that there was an error in his instructions concerning how to fill out the route sheet manifest or an error in his understanding how the document is to be completed. Respondent failed to explain why it completed its

investigation prior to talking with Glasco.

Chambers was Glasco's and Moore's direct supervisor less than a month. There is no evidence he ever worked as a PST. Chambers admitted the rules were not being followed, his predecessor had been lax. There is no evidence Glasco, by estimating his time of servicing the clients instead of recording the actual time of service was engaging in a practice different than all the other PSTs at the time. There is also no evidence Chambers or any other supervisor instructed [*68] Glasco how to fill out the route sheet manifest. It was clear from the route sheet manifest for August 4 that the service times were estimates. For example, item 18 gives the time 7:20 to 7:30 p.m.

Respondent argues the State and Federal regulations, particularly those of the DOT, require the retention of accurate shipping papers and if a driver is pulled over with incomplete documentation, the Respondent is subject to fine and citation. Also, the California Highway Patrol conducts a biannual inspection of the documents. Interestingly, Respondent requested the subpoena of some of these documents be quashed because its method of record

keeping made it unduly burdensome to provide them. Moreover, if Respondent's claim the maintenance of accurate records was a longstanding requirement, why did Chambers admit Respondent had been lax in its requirements. Respondent admits on brief "policies were not being followed and employees were not adhering to the rules." Moreover, why were the records of the lead PSTs concerning the telephone calls to Glasco's and Moorer's patients missing as well as the answering service log if record keeping was necessary and failure to do so is cause for termination? [*69]

2. Events Involving Moorer

Moorer started working for Respondent in March 1997 as a PST. He is married to Glasco's cousin. As noted above, Moorer was very active in the union organizing drive and Respondent knew of these activities. The weekend of August 2 and 3, Moorer and another PST were on-call. They covered different geographical areas. PSTs are required to work on-call during weekends approximately once every six weeks. When working on call, the driver is given a pager and cellular telephone. Calls for service are received by an answering service from about 7:30 Friday evening until about 8:30 a.m. Monday morning. The

answering service then calls the driver informing the PST of the nature of the problem and the clients telephone number.[20] On occasion, the PST is on-call during the evening the Monday through Friday proceeding the weekend. When a PST is on-call during the week, they perform their regular routes first. There are PSTs who work Saturday providing regular service but none work regularly on Sunday.

[*70]

When Moorer receives a message from the answering service while on-call, he first calls the patient to determine if he can rectify the problem during the

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[20] The answering service makes a notation of the time of the call, the name and address of the patient, who placed the call and on occasion, notes the nature of the problem. The answering service then sends Respondent a copy of this documentation. The copy relating to Moorer on August 2 and 3 was admittedly sent to Respondent. Respondent testified these documents are always retained by Respondent. Respondent claimed it used it in its investigation leading to the decision to terminate Moorer. This document is also missing.

telephone conversation. If he can not fix the problem over the telephone, he goes to the patient. When working on-call, the PST must fill out a route sheet manifest and work orders. Moorer claims he worked from 6:00 a.m. August 2 to 3:00 a.m. August 3. This is longer than Moorer usually worked while on call but he had on occasion worked longer. Moorer was scheduled to work Monday August 3. When he reported to work on August 3, he told Rawlings and another individual working for Respondent, the hours he worked while on-call. Moorer was instructed to give Chambers that information, which he did.

Rawlings testified when he heard Moorer say he worked excessive hours, he asked Moorer if that were the case he needed to see his on call sheet and his hours of duty sheet, which is called the DOT log. Moorer claimed he worked as many hours on New Years eve when on call. This testimony was not refuted and there is no showing Moorer completed a DOT log for the excessive hours for that New Years eve. There was no evidence Moorer was given the [*71] next day off because he worked more than 15 hours on duty. Respondent has an on call policy which provides a driver may be terminated for falsification of time sheets. There is no claim the policy mandates termination or

that Moorer was given a copy of the policy. According to Rawlings:

> Well, the hours on duty are what we call the DOT log, I guess, is what we were calling it at the time. It was required anytime anybody worked over 12 hours, we required the drivers to fill those out. And that helps us to find out how many hours on the road, hours off the road he was working, that type of thing. So that we can determine whether or not he needed an eight hours of consecutive time off.

Rawlings later learned Moorer went out on his route. According to Rawlings, when a driver is not available to perform his route, the patients are distributed among the PST drivers who have adjoining routes. Rawlings admitted he did not instruct anyone to make sure Moorer did not go out on his route or that Moorer's patients were distributed to other PSTs. The evidence clearly indicates Respondent did not take Moorer's work orders and redistribute them. This tends to support Moorer's testimony Chambers, [*72] authorized his going out on his route, rather than requiring the mandated 8 hour rest. This also brings into question Respondent's claimed concerns about adhering to State and Federal regulations.

When Moorer turned in his route sheet manifest, Rawlings considered it strange because some patients names appeared two or three times and some long times for telephone calls which he considered excessive. It was determined to call the patients listed on Moorer's route sheet manifest for August 2. Again, Respondent asserts the times listed by the employee, Moorer this time, did not match with the patients recollections. Respondent also used a log routinely provided by the answering service listing all the patient calls it forwarded to Moorer in checking the accuracy of Moorer's route sheet manifest. As previously noted, this is another document Respondent asserts is missing. In contrast to all this suspicion, Respondent paid Moorer for all the work hours he claimed while working on-call August 2 and 3.

Respondent never clearly explained why his claimed hours of work were compensable while constituting falsification. There was no claim of theft. I also find Moorer did turn in the work orders, [*73] for there was no documentation, which only Respondent would possess, that indicates the known patients Moorer said he served were not billed. There was no claim Respondent made any effort to generate duplicate

work orders or otherwise document the service had in fact been provided. As was the case with Glasco, Respondent failed to place into evidence any proof it failed to collect for the services provided by Moorer while on-call. This lack of evidence further calls into question Respondent's claim Moorer failed to turn in the work orders for August 2 and 3.

Respondent's witnesses claimed the signed work orders were needed in order to be able to bill customers. Respondent never claimed its accounting records did not contain information concerning unpaid accounts because of lack of work orders. Respondent also never claimed the service provided by Moorer while working on-call was unsatisfactory. There was no profession the patients reported his service was untimely or took to long. A comparison of the information on the answering service report and Moorer's route sheet manifest could also provide information about the time and timeliness of the service. Respondent presented no such [*74] reliable comparison, raising the question of whether more than a sham investigation was conducted in support of its suspension and termination decisions.

According to Moorer, when he related to Chambers his work hours, Chambers

inquired if he filled out a DOT book, including his hours working on-call. Moorer told Chambers he did not know how to fill out the DOT book, no one instructed him how to perform this task. Chambers then told Moorer to "hold on", had a discussion with another employee, and asked to see the work orders and route sheet manifest for Sunday. Moorer said they were in his truck and he would bring them in. Moorer went to his truck, obtained the documents and gave them to Chambers. Chambers told him they were sloppy, to do them over immediately. When Moorer gave Chambers the recopied documents he was told they were still too sloppy. Chambers also told Moorer he could see he was getting frustrated and to go do his route and when he returned at the end of the day, to again recopy the documents. Moorer claims no supervisor instructed him not to go out on his route that day.

Moorer provided Respondent with a route sheet manifest. The route sheet manifest Moorer provided [*75] Respondent had 19 entries on it, some with duplicate names. How this compared to other on-call results for Sundays was not adduced on the record. There was no evidence concerning how long it would. normally take a PST to perform the services listed on Moorer's route sheet

manifest, particularly taking into account the location of the patient in relation to Moorer's residence, the time spent on the telephone prior to going to the residence, and the nature of the service provided. Chambers admitted telling Moorer, "that I needed to have the work orders and the route sheet that goes with this." There was no mention of the DOT log, indicating Moorer was not informed he was required to complete the log. There was also no evidence Moorer was ever given or possessed such a form to complete. The location of such. Forms was not placed in evidence. It is not known if Moorer had access to this form.

Rawlings and Donald Anderson, Respondent's Department of Transportation specialist, testified Moorer was trained how to fill out the DOT log. Rawlings admitted he was not informed Moorer advised Chambers he did not know how to fill out the DOT log and did not have that information when he recommended [*76] Moorer's termination. Respondent did not present any documentation demonstrating which employees attended training classes. After Glasco and Moorer were terminated. Respondent introduced other record keeping documents, which took the place of the route sheet, manifest. The reasons for the change were never fully explicated. Anderson did

conduct two training session on the new daily log, one on June 16 and the other October 28. Glasco and Moorer were only at Apria for the June 16 training session. There is no record that either alleged discriminatee attended the June 16, training session or of the specific subject matter covered by this session. Clearly, the document the PSTs used in August was the route sheet manifest, as illustrated by those placed in evidence completed by Glasco, Moorer and others, Anderson admitted he could not recall who attended the June training session from the Union City facility.

Accordingly, I find Anderson's testimony concerning what some employees may have been told non-probative of Moorer's knowledge concerning the DOT log, for there is no convincing evidence Glasco and Moorer received such instruction. On the contrary, their use of the route sheet manifest [*77] indicates they were not trained in the manner of completion described by Respondent's witnesses. Respondent did not introduce into evidence any route sheet manifests completed by other drivers on or about August 2 or 3 who worked at Union City. Respondent claimed it had to retain these documents for review by the State Highway Patrol.

Chambers claimed when he learned Moorer was out on his route August 3, he tried all day to raise him on his two-way radio, without success. Moorer was not asked about his radio and he was not disciplined for falling to have his radio operational. In fact, Moorer testified an individual named Ken Polk, the dispatcher, called him on his radio between 5:00 and 6:00 p.m. to inform him Chambers wanted to see him at the end of shift. If Respondent was concerned about the consequences of Moorer working to many hours in contravention of State and Federal regulations, then why was he not informed to come in at that point? Moreover, it seems Respondent knew which work orders it had given Moorer and could have called the clients to leave a message for Moorer. Respondent did not directly refute Moorer's claim Polk contacted him by radio on August 3. There was no [*78] explanation why Moorer's radio was suddenly working when Polk called him this time. Polk did not appear and testify. His absence was unexplained.

That Respondent did not call the patients Moorer was scheduled to see, that Moorer and Glasco both prepared the routes in the same way, serving the closest customer first, seems a routine Respondent would have known, and indicates it was not so concerned about

his working that day to make a concerted effort to reach him, assuming his radio was not working. This lack of effort also belies any claimed strong concern for adherence to State and Federal regulations which Respondent argues mandated Moorer not working on August 3. Respondent was not hesitant to call the patients Moorer serviced while on-call so such action does not seem contrary to any of Respondent's policies. This in another indication Respondent's reasons for terminating Moorer were pretext.

Moorer saw Chambers upon his return Union City, giving Chambers his route sheet manifest and work orders. According to Moorer, Chambers shut the door and asked if he "falsified paperwork." Moorer replied no and asked what Chambers was talking about. Rawlings then said: "I'm asking you one [*79] more time, did you falsify paperwork." Moorer replied: "no, man, I didn't falsify nothing." Chambers then said: "all right, that's immediate termination." Moorer said "all right." Chambers replied: "all right, you know, okay. He, all right, open his door and I left."

Respondent maintains in the branch manager's office a document reflecting its on-call policies. There is no evidence Moorer or any other PST had ever

seen the document or received instruction concerning the policies contained therein. There was no explicit documentation indicating Moorer failed to adhere to any of the stated policies even if he knew them or had been shown to have had read them. As noted elsewhere, Moorer was paid for all claimed hours, indicating sufficient adherence to qualify for such compensation, which is admittedly based on the information recorded on the route sheet manifest. According to Chambers, Moorer was terminated for falling to turn in paperwork, not theft. Moorer's testimony he turned in the work orders is credited. These contradictory reasons is another sign of pretext.

When Moorer came to the Union City facility on the following Wednesday, August 5, Glasco and Chambers were leaving the building [*80] and Glasco said: "Cuddy, which means cousin, Cuddy, they suspended me. I said, well, man, I guess I'm next. And Garland Chambers said, I want to see you in my office." When they got to Chambers, office, the individual named Mike,[21] was already in the office. Chambers asked Moorer for his

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[21] Moorer could not recall or did not know his last name.

phone, key and timecard and informed him he was under investigation for falsifying paperwork. Moorer laughed and stated he did not falsifying paperwork. Chambers then said he would call him, then said to come back to the office on Friday to learn his penalty. Moorer initially testified he called Chambers daily but was told Chambers did not know anything yet. Then he admitted he did not give Respondent his home telephone number. Respondent had his parents telephone number and his sisters telephone number. When he was on vacation Moorer called his sister's number daily and there: were no messages for him, he did not speak with Chambers.[22]

[*81]

After reviewing Moorer's personnel file, according to Rawlings, he, Chambers, Kuller and human resources

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[22] This apparently contradictory testimony does not warrant discrediting all of Moorer's testimony. As noted above, Moorer's demeanor was direct and convincing, generally consistent and unembellished by hyperbole and surmise. Accordingly, unless convincingly contradicted, his testimony has been credited.

determined to terminate Moorer. As was the case with Glasco. Chambers testified he did not participate in the decision to terminate Moorer. Rawlings reasons were:

Based on this information, the fact that it was -- the times didn't match, there were no work orders, we couldn't bill, we had no revenue to generate off of what the work that he claimed to do, all of those things. DOT regulations that were not being followed, all of which kind of led us to believe that this was termination . . . .

Not following the DOT regulations that were required, not turning in the paperwork properly as we required, or as I had asked. The inconsistencies with the times that were listed on the sheet here that has been presented.

Respondent generated a termination payroll report, which gives the reason for Moorer's termination as "misconduct." The documents which the form indicates were attached as the documentation justifying Moorer's termination were another set of missing documents. Also missing were the notes of the calls placed to the patients Moorer serviced while on-call. As was the case [*82] with Glasco. Chambers had the PST leads call the listed customers to verify

the time and nature of the service. Again, any separate documents by Caldwell, Glass and Polk who Chambers claims indicated most of the times did not match, were missing. Chambers' testimony indicated they prepared separate documents but they were not adduced in evidence. Chambers and Klein also claimed to have called some of these patients.

While Chambers claimed to have made the calls, the document which Respondent attempted to place in evidence indicated the information gathered by Chambers and Polk on August 18, was originally verified August 4 by Caldwell and Glass. The underlying documents were missing. The document Respondent adduced could not be verified as reflecting work by Chambers. Thus, from the document, it was unclear who made the calls, who they spoke with, and some or all of the calls may have been made more than two weeks after the service, impairing the reliability of the information, if indeed these employees of Respondent spoke to a person with knowledge of the nature of the service provided as well as the time of such service. Respondent had already determined to terminate Moorer by August [*83] 16, therefore, any claimed reliance on information gained on this date also indicates pretext.

Klein telephoned two of Moorer's patients, one early in his schedule and one near the end of his on call duty. The first patient she called claimed Moorer provided the service two hours earlier than noted in the on-call sheet, and the other claimed Moorer provided the service three hours earlier than stated in the on-call sheet.

Respondent maintained several written policies concerning the maintenance of route sheet manifests and other documents, but there was no evidence either Glasco or Moorer were ever informed of or given copies of these documents. There is no evidence Glasco and Moorer were given access to these policies. Respondent made its determination to terminate Moorer without interviewing him or asking for any explanation concerning the claimed unduly long telephone calls and other asserted suspicious matters. The documents generated in support of its decision to terminate Moorer were missing, factors further suggesting pretext.

Moorer went on vacation in Jamaica for several weeks and when he returned at

the end of August,[23] he learned he had been terminated because, " . . . something [*84] about some license or something . . . he said something about my license, like my license was messed up."

Respondent did inform Moorer it had called some of his patients and there were discrepancies in times. Moorer asked the patients be called in his presence. Respondent denied this request. Moorer was previously disciplined by Respondent for turning in paperwork late. The date of this discipline was not placed in evidence. There is no claim this prior discipline was shortly before the August 2 incident. [*85] In a work appraisal

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[23] Respondent asserted it could not contact Moorer earlier to inform him was terminated. Moorer testified without refutation that he informed Respondent well before his vacation of his plans, in accordance with operating procedure. If Moorer was dissembling, then it was unexplained why Respondent waited until after he returned from vacation to give him his final check and inform him he was terminated. Moorer's testimony that an employee has to complete specific paperwork to receive authorization for vacations was unrefuted.

dated April 22, 1998, it was noted he was to "turn in all paperwork in on daily basis complete and error free," [sic]. Moorer received a good review and an increase in his hourly wage.

Respondent gave various and differing reasons for Moorer's termination. Chambers testified Moorer was "terminated because he failed to turn in paperwork associated with an on-call situation." Rawlings claimed the reason was the patient calls were inconsistent with Moorer's recordation and he failed to provide all the required documentation. Klein claimed Moorer was terminated for falsification of documents. Resort to shifting explanations for Respondent's decision to suspend then terminate Moorer is another indication of improper motive. *Poly-America, Inc.*, 328 NLRB No. 88 (May 28, 1999).

Rawlings admitted he did not know who Respondent's representatives spoke with when they called the patients listed in Moorer's route sheet manifest or on the answering service sheet. He did not know if these contacts had any knowledge concerning the time and nature of the service provided by Moorer. There is no claim and no evidence Moorer failed to provide the services [*86] listed on the

route sheet manifest. There is no claim the answering service log was not received, not checked and failed to corroborate Moorer's route sheet manifest. There was no documentation the patients serviced by Moorer while he was on-call were considered as uncollectable accounts.

Respondent has had problems with other employees concerning paperwork. One had excessive failures to provide service at night as well as paperwork failures, and he is still employed by Respondent. Another employee, had excessive failures to provide service to patients at night and he is still employed by Respondent, even though he was frequently written up for this infraction. This appears to be disparate to the treatment of Glasco and Moorer and is another indication of pretext. This conclusion is supported by Respondents failure to afford Moorer an opportunity to address the claimed falsification.

3. Analysis and Conclusions.

Motive is a question of fact, and the circumstantial as well as direct evidence is considered to determine the employer's motive. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 342 (8th Cir.

1986). [*87] Factors commonly relied upon by the Board and the courts to ascertain motive include the employer's knowledge of the employees, union activity. *TLC Lines, Inc. v. NLRB,* 989 F.2d 1502, 1509 (8th Cir. 1983). In the instant case, Respondent admittedly knew of Glasco's and Moorer's union activity. It is undisputed Glasco and Moorer engaged in concerted protected activity and they cannot be lawfully discharged for engaging in such activity. Respondent's violations of Section 8(a)(1) of the Act, found above, demonstrate Respondent was anti-union and the threats to terminate them for such actions is an additional indication of unlawful motive.

Another factor considered in determining the employer's motive is the timing and abruptness of the adverse action in relation to the employees, union activity. *Wilson Trophy Co. v. NLRB,* 989 F.2d 1502, 1509 (8th Cir. 1993). Here, both Glasco and Moorer were suspended then terminated shortly after the representation election. These suspensions were effected prior to Respondent conducting investigations into the incidents. Although Respondent makes a facially convincing argument Glasco and [*88] Moorer failed to observe important policy, Respondent had access to all of Glasco's route sheet manifests and failed

to refute his claim he filled out the August 4 route sheet manifest in the same manner he had been taught. Both Glasco and Moorer were considered better than average employees, a factor Respondent did not discuss when presenting its reasons for their suspension and termination.

While preparation and availability of paperwork was argued by Respondent to be crucial to its operation, Chambers admitted when he became Glasco's and Moorer's direct supervisor shortly before they were suspended then terminated, that all the PSTs were sloppy and lax in their paperwork. There was no convincing evidence either Glasco or Moorer were instructed in how to prepare the documents brought into question in this proceeding. There was no evidence Respondent routinely suspended and/or terminated employees for being "lackadaisical" and not "following policy and procedures" in the preparation and submission of their paperwork. There was no evidence of discipline of other PSTs for their admitted failures to follow Respondent's policies and procedures.

The reasons given for Moorer's termination [*89] varied, from failure to turn in paperwork to falsification. Interestingly, Respondent's paperwork

issues included a laxity in its retention of the documents it assertedly predicated its disciplinary decisions upon in this case. The notes of the lead PSTs were missing, the attachments to Moorer's termination that assertedly warranted the decision were missing, and the answering service log was missing. Chambers, admission of generally poor maintenance of paperwork by the PSTs, Respondent's own performance in maintaining paperwork are indicative its stated reasons for the suspension and termination of Glasco and Moorer are pretext. A defense based on pretext buttresses an inference of unlawful motive. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966).

Another indication of improper motive is Respondent's commission of violations of Section 8(a)(1) of the Act prior to the suspension and termination of Glasco and Moorer. These pre-suspension, predischarge violations establish Respondent's antiunion bias. *NLRB v. DBM, Inc.*, 987 F.2d 540, 543 (6th Cir. 1991). 1 conclude Respondent's proffered justifications [*90] for its disciplinary actions against Glasco, and Moorer fail to withstand scrutiny. *Hall v. NLRB,* 941 F.2d 684, 688 (8th Cir. 1991). Respondent failed to ascertain and check Glasco's explanation prior to

suspending and terminating him. Respondent's bare assertions, without the notes and testimony from the lead PSTs who made the telephone calls to the customers, renders Respondent's claims by witnesses found not credible suspect.

Having credited most of Moorer's testimony, I find all the paperwork, save the DOT log, was turned into Respondent by Moorer. Chambers did not specifically deny Moorer informed him he needed his help to perform that task. There is no evidence such help was proffered. Moreover, the failure to inform Moorer that one of its reasons for suspending and terminating him was his failure to turn in his work orders and DOT log for the time he was on call August 3 is another indicia of proscribed motive. *Humes Electric, Inc. v. NLRB*, 715 F.2d 468, 471 (9th Cir. 1983).

Respondent's reference to Moorer as the "ringleader" of the union organizing effort is a euphemism for troublemaker and further supports the [*91] inference of an unlawful motive. Under the *Wright Line, supra*, 251 NLRB 1083, (1980), standard, Moorer's and Glasco's union organizing activity was a motivating factor in Respondent's termination decisions, and Respondent did not sustain its Wright Line burden of credibly

demonstrating it would have terminated Glasco and Moorer even in the absence of their protected concerted activities. There is also evidence of disparate treatment. Respondent did not suspend or terminate employees who failed to turn in their paperwork , or were late in turning in their paperwork. This disparity not only supports the inference of unlawful motive, but indicates Respondent's reasons for suspending and terminating Glasco and Moorer were pretexts for Chambers admitted, without refutation that the PSTs were very sloppy in their paperwork.

This admission of a historical practice which was not shown to have been specifically and clearly corrected concerning Glasco, and Moorer gives support to Glasco's testimony he always filled out his route sheet manifest by estimating times of arrival and departure. While Chambers indicated he wanted the paperwork practices of the PSTs to [*92] improve, he never claimed he instructed any PST what improvements he expected or required. Moreover, Chambers admitted he did not participate in the decisions to suspend and terminate Glasco and Moorer.

There was no demonstration Rawlings or any other supervisor, heard Chambers,

generalized comments of a need for improved paperwork. Rawlings had worked at the Union City facility for years, and there is no evidence he required the PSTs to improve their performance regarding paperwork. The paperwork issue appears to have taken on major significance only when the two major Union activists among the PSTs failed to comply with requirements which were not shown to have been previously enforced.

Respondent's supervisors informed Glasco, Moorer and Blackmore union activity could result in dire consequences and then suspended and terminated the two PSTs who were most active in the union organizing drive. I conclude under *Wright Line, supra*, 251 NLRB 1083 (1980), Glasco's and Moorer's protected union organizing activity was a motivating factor in Respondent's decisions to suspend and terminate them. I further conclude Respondent failed to demonstrate it would have [*93] suspended and terminated Glasco and Moorer absent their concerted protected activity. I find the record establishes Respondent had a discriminatory intent in its treatment of these union adherents. Accordingly, I find Respondent violated section 8(a)(3) and (1) of the Act by suspending and terminating open union activists Glasco and Moorer.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party Teamsters Local 853 A/W International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of section. 2(5) of the Act.

3. Respondent violated of Section 8(a)(1) of the Act by; interrogating and giving the impression that support for the union would be futile; threatening and promising employees benefits to discourage support for the union; and. interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

4. Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating Simeon Glasco and Maurice Moorer, at least in part, because they engaged in protected concerted activity.

5. The unfair labor practices [*94] described above are unfair labor practices within the meaning of section 2(6) and (7) of the Act.

Remedy

Having found the Respondent has engaged in unfair labor practices, I recommend it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

I recommend Respondent immediately offer employment to Simeon Glasco and Maurice Moorer, or, if their prior positions are not available, to substantially equivalent positions. Further, Respondent shall be directed to make Simeon Glasco and Maurice Moorer whole for any and all losses of earnings and other rights, benefits, and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I recommend Respondent be ordered to expunge from its records any reference to the unlawful suspensions and terminations and to give Simeon Glasco and Maurice Moorer written notice of such expunction and to inform [*95] them that Respondent's unlawful conduct will not be

used as a basis for further personnel actions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[24]

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening employees with termination if they persisted in engaging in concerted protected activities; interrogating employees about their Union activities and sentiments; giving the impression support of the Union would be futile; and, offering unspecified benefits to discourage support for the Union.

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[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended. Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Suspending and discharging its employees because they engaged in protected concerted activities.

(c) In any [*96] other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this order, offer Simeon Glasco and Maurice Moorer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earning and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision, and remove from its files any references to their unlawful. suspensions and terminations and within 3 days thereafter notify the disriminatees in writing that this has been done and that such terminations will not be sued against them in any way.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, [*97] including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(c) Within 14 days after service by the Regional Director, post at its Union City, California office copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all

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[25] If this order is enforced by a Judgement of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS OF ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places were notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent: shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 5, 1998.

[*98]

(d) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, San Francisco, California, August 12, 1999.

Joan Wieder
Administrative Law Judge

APPENDIX

NOTICE OF EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

After a hearing at which all parties had a opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

Section 7 of the Act gives all employees the following rights:

To organize
To form, join, or assist any union
To bargain as a group through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection To refrain from any or all such activity except to the extent that the employees, bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

Accordingly, we give you these assurances: [*99]

WE WILL NOT coercively interrogate you, create the impression your union organizing or other concerted protected activity is futile, threaten employees with loss of employment if they pursue union representation, or promise benefits as an inducement to not support union representation.

WE WILL NOT suspend, discharge or otherwise discriminate against employees because they engaged in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Order, offer Simeon Glasco and Maurice Moorer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and, WE WILL make Simeon Glasco and Maurice Moorer whole for their loss of earning and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their suspensions [*100] and discharges and their suspensions and discharges will not be used against them in any way.

APRIA HEALTHCARE GROUP, INC.,

(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1301 Clay Street, Room 300N, Oakland, California 94612-5211, Telephone 510-637-3270.

Randell Warehouse of Arizona, Inc. and Sheetmetal Workers' International Association, Local 359, AFL-CIO,	) Case No. 28-RC-5274

NATIONAL LABOR RELATIONS BOARD

1999 NLRB LEXIS 528
161 L.R.R.M. 1265
328 NLRB No. 153

July 27, 1999

[*1] DECISION AND CERTIFICATION OF REPRESENTATIVE

By John C. Truesdale, Chairman; Sarah M. Fox, Member; Wilma B. Liebman, Member. J. Robert Brame III, Member, concurring in the result. Peter J. Hurtgen, Member, dissenting.

OPINION:

This case presents the question whether the Petitioner-Union engaged in objectionable conduct by photographing the interaction of union representatives distributing literature outside the Employer's plant and employees either accepting or refusing the materials. For

the reasons that follow, we shall overrule the Employer's objections and certify the Union.

Procedural Background

On April 5, 1995, Hearing Officer Lewis S. Harris issued the attached report recommending disposition of objections to, and determinative challenges in, an election held on February 3, 1995. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally [*2] of ballots shows 40 for and 32 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.[1]

On June 12, 1996, the National Labor Relations Board issued a notice of hearing, scheduling for oral argument the issues raised in the Employer's Objection 2 concerning the Union's photographing of employees. On August 7, 1996, the Board heard oral argument in this case and in

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[1] The original tally of ballots showed 40 for and 32 against the Petitioner, with 25 determinative challenged ballots. At the hearing, the parties stipulated that 24 of the 25 challenged ballots were cast by employees who were ineligible to vote.

Flamingo Hilton-Reno, Inc., Case 32-CA-14378.[2] The Employer, the Petitioner, and the following amici curiae all filed briefs and participated in the oral argument concerning the issues presented in this case: the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); the Council on Labor Law Equality (COLLE); the Labor Policy Association; Overnite [*3] Transportation Company; and the International Brotherhood of Teamsters (Teamsters).

The Board has reviewed the record in light of the exceptions and briefs, and had adopted the hearing officer's

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[2] On March 8, 1999, the Board issued an order in *Flamingo Hilton-Reno*, granting the joint motion of the respondent and the charging party to remand the proceeding to the Regional Director for processing of a non-Board settlement.

findings[3] and recommendations[4] only to the extent consistent with this decision.

In its Objection 2, the Employer alleged: "Numerous acts of intimidation, including threats and implied threats by Union adherents and agents directed to eligible voters occurred prior to and during the day of the election." Among the alleged acts of intimidation to which the Employer referred was the Petitioner's photographing of the distribution of union literature outside the Employer's premises during the critical period. This allegation is discussed above. We adopt the hearing officer's finding that the other threats alleged in Objection 2 were not made by

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[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[4] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Employer's Objections 1 and 3.

agents, representatives, or officers of the Union, and that they were not objectionable when measured by the Board's third-party standard.

[*4]

FACTS

The parties stipulated that prior to the election, union representatives took photographs of other union representatives distributing union literature outside the Employer's facility.[5] These photographs necessarily included both employees who accepted and those who rejected proffered literature, and potentially provided the Union with a means of learning the identity of employees. Employee Carlos Vasquez testified that when he asked one of the individuals distributing the fliers why the other person was taking pictures, he

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[5] Apart from this stipulation, several employees testified that photographs were taken outside the Employer's facility on other occasions but were unable to identify the person taking the pictures. In light of our disposition of this case, we find it unnecessary to decide whether, as the Employer contends, the Union was responsible for these actions.

was told, "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run." Vasquez also testified that he knew that this individual was "a representative from the Union" because he was with the individuals who were handing out leaflets.

[*5]

The Hearing Officer's Report

The hearing officer found that the Union's photographing of employees reasonably tended to interfere with employee free choice. Citing *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), and *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989), the hearing officer stated that, "in the absence of a valid explanation, photographing employees by a union, amounts to objectionable conduct." Applying that standard, the hearing officer found no evidence that the Union ever communicated to employees the reason for the photographing. The hearing officer also found that, in any event, the explanation given, i.e., "it's for the Union purpose," was "hardly enough to comfort someone that the photographs might not be used for some other, possibly devious, purpose." Accordingly,

the hearing officer recommended that the election be set aside.

Positions of the Parties and Amici

The Union argues that the photographing was not objectionable conduct. Initially, the Union contends that the Board should overrule *Pepsi-Cola Bottling* to the extent that it holds that union photographing is objectionable in the absence of a [*6] legitimate explanation to employees. The Union also argues that, even under *Pepsi-Cola Bottling,* the photographing was not objectionable because the explanation "it's for the Union purpose" was shown, contrary to the hearing officer, to have been made by a union representative, and was sufficient to establish a legitimate purpose for the photographing.

The Employer generally contends that *Pepsi-Cola Bottling and Mike Yurosek & Son* were correctly decided and that the hearing officer correctly applied them to find that the Union's photographing of employees in this case was objectionable.

Amici AFL-CIO and Teamsters argue that *Pepsi-Cola Bottling* and its progeny should be overruled and that the Board should find that union photographing is

objectionable only if accompanied by threats to employees. In the view of these amici, the standard set forth in *Pepsi-Cola Bottling* is inconsistent with the organizational role played by unions under the Act and with precedent establishing that unions may engage in conduct that would be considered objectionable interrogation or surveillance if engaged in by employers.

Amici COLLE, LPA, and Overnite Transportation urge the Board [*7] to apply the same standard to union and employer photographing of employees because, in their view, employers and unions are equally capable of coercing employees. These amici assert that Pepsi-Cola Bottling was correctly decided and that the hearing officer correctly found that the Union's photographing of employees was objectionable under that standard.

Analysis

In *Pepsi-Cola Bottling*, the Board sustained an objection to an election based on the union's videotaping of employees being handed union leaflets as they were exiting the employer's premises during a union rally held the day before the election in front of the employer's plant. No one ever explained the purpose

of the videotaping, either at the rally or at the hearing. The Board concluded on these facts that the videotaping intruded on the employees' Section 7 right to refrain from any or all union activities, including the union rally then in progress. Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them.

289 NLRB at 737.[6]

[*8]

Subsequently, in *Mike Yurosek & Son, Inc.*, the Board applied *Pepsi-Cola* to find objectionable the union's photographing of prounion and antiunion employees' campaign activities in front of the plant gate. The union representative testified at the hearing that the pictures were taken because the subjects wanted to be photographed and to keep a record of antiunion activities in the event the union subsequently filed election objections or unfair labor

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[6] The Board also noted that word of the videotaping incident was disseminated and that the election was very close (28 for and 26 against the union).

practice charges. However, during the course of the election campaign, a union representative told a known antiunion employee that "we've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here." The Board found the photographing objectionable, noting that "no explanation was provided to employees while pictures were being taken to assuage their fears that the pictures would be the basis for future reprisals," and that the union representative's remarks were arguably threatening. 292 NLRB 1074.

In contrast, the Board found that union photographing of employees at a union-sponsored picnic was not objectionable in *Nu Skin International*, 307 NLRB 223 (1992). [*9] The situs of the photographing was a picnic which employees voluntarily attended (rather than the plant entrance as in *Pepsi-Cola* and *Mike Yurosek*) and union representatives had explained at the picnic that the photographs would be used as mementos and sent to a newspaper for publicity. (In fact, the union distributed copies of the photographs to employees after the election and sent them to the union's newspaper.) Under these circumstances, the Board found that the photographing was "innocuous and

entirely distinguishable from that in *Pepsi-Cola* and *Mike Yurosek*."

On further consideration, we have concluded that the standard for union photographing of employees in a pre-election setting established by Pepsi-Cola Bottling is inconsistent with Board law involving union inquiry into employees' sentiments respecting representation. Pepsi-Cola's general prohibition against making a visual record of employees' reactions to proffered union literature cannot be reconciled with Board and court cases permitting unions to ask employees directly whether they support the union, to attempt to persuade employees to sign petitions in support of representation, and to record the employees' [*10] responses. See *Springfield Hospital*, 281 NLRB 643, 692-693 (1986) (overruling employer's objection that union coerced employees by asking them whether they were for or against union and recording responses on charts, in the absence of threats of reprisal), enfd. 899 F.2d 1305 (2d Cir. 1990); *Kusan Mfg. Co.*, 267 NLRB 740 (1983) (overruling employer's objection that union interfered with the election by soliciting employees to sign a prounion petition, by circulating the petition, and by distributing copies of the petition, in the absence of threats

of reprisal), enfd. *749 F.2d 362 (6th Cir. 1984); J.C. Penny Food Department*, 195 NLRB 921 fn. 4 (1972) (overruling employer's objection that union interfered with the election by polling employees as to how they were going to vote in the election, in the absence of coercion), enfd. 82 LRRM 2173 (7th Cir. 1972), followed in *Melrose-Wakefield Hospital v. NLRB*, 615 F.2d 563, 569 (1st Cir. 1980). The Board has also found that a union did not [*11] interfere with employee free choice when it asked pro-union employees to report to the union the activities of coworkers who were assisting management during the election campaign. *Mercy-Memorial Hospital*, 279 NLRB 360 (1986), affd. in the summary judgment proceeding, 282 NLRB 5 (1986), enfd, sub nom. *NLRB v. Mercy-Memorial Hospital Corp.*, 836 F.2d 1022) (6th Cir. 1988).[7]

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[7] See also *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which union organizers recorded the license plate numbers of cars parked in the employee parking lot and, with the cooperation of the state department of motor vehicles, secured employee names and addresses. Based on this information, the union sent mailings to employees' homes; it also attempted to contact employees by phone or

(continued...)

[*12]

In recognizing that it is not objectionable for unions to ask employees if they support the union and record the employees' views, these cases reflect the role played by unions under the Act in "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Indeed, the Supreme Court has recognized that Section 7's protection of employee's right of self-organization legitimates a union's efforts to communicate with employees, because "the right of self-organization depends in some measure on the ability

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(...continued)
home visits. Id. at 530. In its opinion, the Supreme Court cited the "union's success in contracting a substantial percentage of [employees] directly, via mailings, phone calls, and home visits" as evidence that the union had reasonable alternative means of reaching employees short of trespass on the employer's property. Id. at 540. Thus, the Court implicitly approved the methods of communications that the union used.

of employees to learn the advantages of self-organization from others." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Unions, of course, may ask employees to sign authorization cards or some other record of support and, indeed, a union must submit evidence of such support before it may invoke the Board's election machinery--the formal mechanism by which employees' preferences are determined.[8]

[*13]

As the Petitioner and some amici have noted, there are many legitimate reasons why a union would photograph employees in the course of an organizing campaign. Amicus AFL-CIO notes that such photographs may aid in the direction and deployment of union staff, may be used for campaign literature, or may be used to identify potential supporters among employees who union agents do not know by

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[8] Under Sec. 9(e)(1)(A) of the Act, a representation petition must be supported by "a substantial member of employees." The Board defines "substantial" to mean at least 30 percent. See Sec. 101.18(a) of the Board's Statements of Procedure. The most commonly submitted evidence of support consists of signed authorization cards.

name. Amicus Teamsters notes that unions may photograph employees to demonstrate to workers that the union is on the scene and active in the campaign, to gauge the extent of its support among the employees, and to identify supporters and potential supporters. Finally, the Petitioner notes that, because unions do not have access to the employer's premises, they often must organize by using covert means and by soliciting the involvement of sympathetic employees.

Commentators have similarly observed that identifying potential supporters is a crucial initial step in an organizing campaign, one that often must be undertaken prior to the filing of a petition and receipt of an Excelsior list of employee names and addresses, Gagala, Union Organizing and Staying Organized (1983) at 149, 157. See also [*14] Craft and Extejt, "New Strategies in Union Organizing," Journal of Labor Research Vol. 4, 1 (Winter 1983) at 20 (personalized, face to face contact is essence of traditional organizing campaign).

In sum, photographing employees during an organizational campaign is one means by which unions can determine the identity and leanings of employees and

carry out their legitimate objective of attaining majority support.

We find no objective or principled basis for distinguishing between asking an employee to sign an authorization card and recording the employee's response in documentary form, on the one hand, and making a visual record of the employee's response through videotaping or photography on the other. We therefore overrule *Pepsi-Cola* and reject its premise that union photographing or videotaping of employees engaged in protected activities during an election campaign, without more, necessarily interferes with employee free choice.[9]

[*15]

We do not, however, overrule *Mike Yurosek* because we would reach the same result today on the facts presented there. In contrast to Pepsi-Cola, where the union's videotaping was not accompanied by any threats or other coercive conduct, in the *Mike Yurosek*

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[9] This case does not involve photographing of employees in connection with picket line activities, and we express no opinion as to the coercive nature of photographing by a union under those circumstances.

case, a union representative told an antiunion activist that "we've got it on film; we know who you guys are ... after the Union wins the election some of you may not be here." As former Member Higgins pointed out in *Mike Yurosek*, "the photographing of antiunion employees accompanied by this statement could reasonably put employees in fear that the pictures would be used for future reprisals and was therefore objectionable." 292 NLRB at 1074 fn. 5. Significantly, no threats of this character, attributable to the Union, are present in the instant case.

We recognize that, in contrast to our holding here, the Board has found, with court approval, that, absent proper justification, employer photographing or videotaping of employees engaged in protected activities is unlawful "because it has a tendency to intimidate." *F.W. Woolworth Co.*, 310 NLRB 1197 (1993) [*16] (employer photographing and videotaping of employees handing out leaflets in front of store unlawful).[10]

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[10] In *F.W. Woolworth*, the Board reaffirmed prior cases holding that "photographing in the mere belief that something "might" happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere

The Board and the courts, however, have long applied differing standards to certain types of employer and union conduct during election campaigns in recognition of the fundamental fact that an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment. Consequently, there is no merit in the contention that it is inequitable and inconsistent for the Board to permit unions to photograph employees being offered campaign literature, while barring the same conduct by employers.

[*17]

For example, an employer is generally prohibited from visiting the homes of its employees for the purpose of campaigning against the union. *Peoria Plastic Co.*, 117 NLRB 545 (1957). Home

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with employees' right to engage in concerted activity." 310 NLRB at 1197. In 1998, three courts of appeals cited F.W. Woolworth with approval and followed its sound principles *Clock Electric v. NLRB*, 162 F.3d 907 (6th Cir. 1998); *National Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268 (D.C. Cir. 1998); and *California Acrylic Industries v. NLRB*, 150 F.3d 1095 (9th Cir. 1998).

visits by union representatives, however, are unobjectionable so long as they are unaccompanied by threats or other coercive conduct. *Canton, Corp's, Inc.*, 127 NLRB 513 fn. 3 (1960). Indeed, the Board's landmark decision in *Exelsior Underwear*, 156 NLRB 1236, 1244 fn. 27 (1966), expressly contemplates that unions will visit employees in their homes. The rationale for the Board's disparate treatment of similar employer and union conduct was well set forth in Plant City Welding, as follows:[11]

> There is a substantial difference between the employment of the technique of individual interviews by employers on the one hand and by unions on the other, Unlike employers, unions often do not have the opportunity to address employees in assembled or informal group, and never have the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews [*18] conducted by

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[11] *Plant City Welding & Tank Co.*, 119 NLRB 131-134 (1957), revd. on this other grounds 133 NLRB 1092 (1961).

> employers. Thus, not only do unions have more need to seek out individual employees to present their views, but, more important, lack the relationship with the employees to interfere with their choice of representatives thereby.

Polling is another area of the law in which employers and unions are held to different standards. Thus, it is well established that an employer may not conduct a pre-election pool of its employees. See *Offrier Electronics*, 127 NLRB 991 (1960).[12] On the other hand, a "union engaged in organizing employees may legitimately measure its support among the work force." *Glamorise Foundations*, 197 NLRB 729 (1972), citing *J. C. Penny Food Department, supra*. The Board's policy of treating the two types

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[12] See also *Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967) ("A poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to be found violative of Section 8(a)(1) of the Act.").

of polling differently was endorsed by the Sixth Circuit in *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362 (6th Cir. 1984). [*19] Although the employer contended that "what is sauce for the goose is sauce for the gander," the court was not persuaded, stating : "By no stretch of the imagination are employers of unorganized workers and unions seeking to organize those workers equally matched with respect to their powers of or opportunities for the exercise of coercion... This disparity between the disruptive powers of the employer and those of the union convinces us that pre-election polling by the union is not impermissible per se." 749 F.2d at 364-635.

Kusan was recently followed by the Sixth Circuit [*20] in *Moremont Corp. v. NLRB*, 177 F.3d 573 (6th Cir. 1999). The court stated that it agreed with the holding in *Kusan* that "although pre-election polling by an employer is per se objectionable, a union seeking to represent employees has a different relationship to them that makes pre-election polling less coercive." 177 F.3d 577.

The Seventh Circuit reached the same conclusion in *Louis-Allis Co. v. NLRB*, 463 F.2d 512 (7th Cir. 1972). The court

rejected the employer's argument that because employer polling is coercive, union polling is likewise coercive. "The employer occupies a far different position with regard to the coercive impact of its actions upon employees than does a Union. The Board, recognizing this difference, has frequently applied different standards to the actions of the employer than it has to similar actions of unions." 463 F.2d at 517. The court quoted with approval from the Fifth Circuit's decision in *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969), as follows: "An employer in an unorganized plant, with [*21] his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant."

Similarly, in evaluating the potential coercive impact of employer speech, the Supreme Court has stressed that any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to

§ 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Again, no such relationship of economic dependency exists between a union and the employees it seeks to represent.

For all of the above reasons, we conclude that the [*22] Union's conduct, in photographing employees during the distribution of union literature outside the Employer's premises, absent evidence of any express or implied threats or of other coercion, was not objectionable. Therefore, we need not examine the adequacy of the Union's explanation for its conduct. Accordingly, we shall overrule Objection 2 and certify that the Union is the representative of the unit employees.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Sheetmetal Workers' International Association, Local No. 359, AFL-CIO, and

that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All probationary employees beginning ninety (90) consecutive calendar days after being hired by Randell and all regular employees who re assemblers, janitors, hourly maintenance, shippers, and craters, stampers and shearers and warehouse persons employed by the Employer in Tucson, Arizona.

EXCLUDED: All supervisors, employees occupying positions of a labor relations confidential nature, salaried employees, temporary employees, employees designated as managerial trainees, [*23] secretaries and office clerical employees, guards, managers, administrators and executives.

Date, Washington, D.C. July 27, 1999

John C. Truesdale, Chairman
Sarah M. Fox, Member
Wilma B. Liebman, Member

CONCUR BY: BRAME

CONCUR:

Member J. Robert Brame III, concurring in the result.

The case before us raises two questions. The first is whether photographing or videotaping participants in the course of protected activity is so unusual and threatening that it is prima facie, or per se, objectionable (or unlawful), My colleagues properly answer "no" to this question. The second is whether the Board may nevertheless prohibit one party--the employer--from photographing such activity without an affirmative justification of its conduct. Lacking any reasoned basis, my colleagues answer "yes" to this question.

In overruling existing case law prohibiting labor organizations from photographing or videotaping employees, involved in activities protected by the act without offering the employees a "legitimate explanation" for so doing, *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB 736, 737 (1988), my colleagues recognize that the act of photographing is not inherently coercive. Notwithstanding, [*24] they simultaneously hold that the identical conduct engaged in by an employer is presumptively coercive and refuse

likewise to overrule *F. W. Woolworth Co.*, 310 NLRB 1197 (1193) (prohibiting employers from photographing or videotaping protected activity without "proper justification"). As I believe the Board must treat like conduct identically, I join with my colleagues in overruling *Pepsi-Cola*, but cannot acquiesce in their refusal to abandon *F. W. Woolworth*.

In the context of this case, I join with my colleagues in overruling the Employer's objections to an election held February 3, 1995, among employees who work in a warehouse facility in Tucson, and who voted for representation by the Petitioner by a margin 40 to 32 votes. Thus, I agree that Petitioner is entitled to certification as the collective-bargaining agent of those in the stipulated unit.

The Employer's second objection to the election asserted that, "Numerous acts of intimidation, including threats and implied threats by Union adherents and agents directed to eligible voters occurred prior to and during the day of the election. Such acts and threats created an atmosphere of coercion [*25] and intimidation which, reasonably, tended to interfere with the free and uncoerced choice of the employees." The

Regional Director directed a hearing. The hearing officer found merit in the objection only to the extent the Employer adduced evidence that related to the photographing of employees by union representatives.[1] I agree with the hearing officer and my colleagues that other evidence presented in support of the objection does not form a basis for overturning the election.

I. FACTS

The facts are concise and may be taken verbatim from the report of the hearing officer:

The parties stipulated that prior to the election, Union representatives took photographic pictures of Union representatives distributing Union literature outside of Employer's plant. Several employees testified, [sic] that a person with a camera aimed the camera at their persons or their vehicles when they were exiting the [*26] Employer's property while other individuals were distributing Union flyers. There is no evidence that the Union ever communicated

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[1] No exception were filed by the Employer to the hearing officer's recommendation its Objections 1 and 3 be overruled.

to employees the reason for the use of a photographic camera at those times. Employee Carlos Velazquez testified that he asked one of the individuals distributing flyers why the other person was taking pictures. Velazquez, testified that he was told. "It's for the Union purpose, showing transactions that are taking place. The Union could see us handling flyers and how the Union is being run."

As to this statement, the hearing officer commented: "This not so clear explanation is hardly enough to comfort that the photographs might not be used for some other, possibly devious, purpose.

Based on this evidence, the hearing officer properly recommended sustaining the objection under the Board law as it existed until today:

The Board has held that, in the absence of a valid explanation, photographing of employees by a union, amounts to objectionable conduct. *Mike Yurosek & Son Inc.*, 292 NLRB 1074 (1989). The Board has also found that the unexplained videotaping of employees as they exited the employer's plant and were banded [*27] union leaflets warranted the setting aside of an election and

directing a new one. *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB 736 (1988). The Board found in *Pepsi-Cola*:

> Absent any legitimate explanation from the Union, we find employees could reasonably believe the Union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating, and would reasonably tend interfere with employee free choice in the election.

II. ANALYSIS

My colleagues propose that different legal standards be applied to photographing and videotaping, depending on whether the conduct is engaged in by an employer or a union. I cannot agree. Instead, a uniform standard should be followed, whether the photographing occurs in representation or unfair labor practice cases, whether it arises in organizing, strike, or picketing situations, and whether it is carried out by an employer or a union. In my view, such a standard, systematically applied, will protect employees from intimidation without unduly restricting employers or labor organizations from conduct that does not reasonably tend to intimidate.

A. General Legal Standards

Before [*28] detailed analysis, however, a few observations are in order concerning legal standards governing conduct in issue in representation and unfair labor practice proceedings. Where a representation objection is filed asserting that the "laboratory conditions," under which Board elections are to be held,[2] have been violated by a party to an election, the decisional standard is whether the "conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election."[3] In an unfair labor practice proceeding, the question, regarding employer conduct, is whether it may reasonably tend "to interfere with, restrain, or coerce,"[4] or, regarding union conduct, whether it may reasonably tend to "restrain or coerce."[5] employees

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[2] *General Shoe Corp.*, 77 NLRB 124,127 (1948).

[3] *Pepsi-Cola Bottling Co., supra*, 289 NLRB at 736.

[4] *NLRB v, Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

[5] *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852-853 (3d Cir.

exercising rights secured by Section 7 of the Act.[6] While declaring that alleged misconduct need not be judged by the same criteria in representation and unfair labor practice proceedings, the Board has acknowledged that "the result will ordinarily be the same"[7] As shown below, whether photographing or videotaping is alleged as objectionable or as an unfair labor practice by an employer or a union, the ultimate issue is whether the conduct [*29] may reasonably tend to instill a

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1964), cert. denied 379 U.S. 826 (1964).

[6] In pertinent part, Sec. 7 provides that:

> Employees shall have the right to self-organization, to form join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

[7] *General Shoe, supra*, 77 NLRB at 127.

fear of reprisal in the minds of employees, accordingly, depending how the evidence is assessed, either standard is satisfied or neither is.

[*30]

B Photographing and Videotaping

The Board has not been a model of consistency or symmetry in developing precedent to control cases in which issues relating to photographing or videotaping arise, and courts of appeal have taken different approaches to addressing the problem.

1. Employer photographing

Most cases have involved employer conduct. Historically, in the Board's view, " An employer that photographs or videotapes employees engaged in concerted activities may engage in prohibited surveillance, or may unlawfully create the impression of surveillance, or both."[8] The pivotal question, however, is

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[8] I Hardin, The Developing Labor Law 129 (3d ed. 1991), and cases cited therein at 129-130.

whether such activity is per se,[9] or presumptively,[10] unlawful (or objectionable), unless the employer provides "proper" or "legitimate" justification, or whether the conduct must be judged "in the circumstances"[11] without reliance on a rule that shifts the burden of persuasion from the General Counsel or objecting party to the other side. On this point, the Board, has generally followed the former view, though without not vacillation. As in my opinion this position is flawed, I would abandon it an substitute the "in the circumstances" approach, aided by the application of [*31] flexible criteria for making judgments in varying contexts.

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[9] *U.S. Steel Corp. v. NLRB*, 682 F.2d 101 (3d Cir. 1982) (referring to "Board's per se doctrine.").

[10] I Hardin, The Developing Labor Law, supra 129 ("The Board presumes that the photographing of peaceful protected activity violates section 8(a)(1), but it allows the employer to rebut the presumption by proof of specific circumstances." [footnote omitted])

[11] *U.S. Steel Corp. v. NLRB*, supra, 682 F.2d at 101.

In an early case, May Department Stores Co.,[12] the Board found unlawful the Respondent's taking of motion picture and still photographs of union organizers distributing handbills to employees, and subsequently of employees and union members picketing, in front of its store. But the Board applied no presumptions, finding instead that the purpose of the conduct was to seek [*32] "police aid for the sole purpose of having police interfere with the normal activities of the union."[13] Eight years later, citing May, the Board found a violation where an employer took photographs of union leaflet, distribution and picketing outside its plant. Radio Industries, Inc.[14] The Board did not speak explicitly in terms of an antecedent requirement that the employer justify the action. But the Board did reject the employer's contention that it had the right to take precautions against "situations that might be considered not peaceful" since pictures were taken only of peaceful

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[12] 59 NLRB 976, 1010-1011 (1994), modified on other grounds 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (1946).

[13] Id. at 1011.

[14] 101 NLRB 912 (1952).

activity which would not support an application for a court injunction.[15]

In Hudson Hosiery [*33] Co.[16] the Board was careful to tie to the circumstances its finding of a violation of Section 8(a)(1), where a supervisor photographed strikers patrolling in front of the plant. "The only meaning the employees could read into the conspicuous filming of their peaceful picket lines by management officials, when they at the same time heard the admonitions of Supervisor Grimm [that their jobs were in jeopardy from their strike activity], was that the Respondent, after identifying and warning them, would probably discharge the if they did not immediately cease their strike."[17]

The vice inherent in "surveillance" derives essentially from the intimidatory or coercive effect of employer spying on its employees concerted activities, which

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[15] Id. at 925.

[16] 109 NLRB 1410 (1954).

[17] Id. at 1411, Two dissenters in Hudson disagreed that Grimm's remarks amounted to threats, and argued forcefully against finding illegal the "mere taking of pictures".

are not normally freely open to the employer's observation. Here the activity in which employees were engaged, a picket line, was from its very inception necessarily and completely public, open to the observation from source, and, by reason of tits purpose, was intended to be observed by anyone, including the public at large employer, Id. at. 1414.

[*34]

Following these early cases, the Board regularly presumed employer photographing to be unlawful. See e.g., *Preston Feed Corp.*[18] (photographing of peaceful pickets constitutes unlawful surveillance absent explanation or justification);[19] *Flambeau Plastics*

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[18] 134 NLRB 629, 643 (1961), enfd. 309 F.2d 346 (1st Cir. 1962). [*35]

[19] But see, *Tennessee Packers, Inc.*, 124 NLRB 1117, 1123 (1999) (violation found because "the taking of picture by an employer, who is known to be adverse to the unionization of its employees and has threatened to close its plant, of its employees while engaged in union activities; to wit, receiving union literature of union organizers, necessarily has a normal and natural tendency to create fear and consternation

Corp.[20] ("It is clear that an employer has no right to take pictures of peaceful picketing of his premises a lawful strike engaged in this employees...absent a showing of justification or valid explanation for such actions."); *Glomac Plastics, Inc.*[21] ("Absent unusual circumstances, it constitutes unlawful surveillance of protected concerted activities for a new employer to photograph his employees' peaceful

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in the hypothetical reasonable employee that the employer is recording, for some present or future course of action involving him, an act of that employee's which that employee knows to be displeasing to the employer.") [Emphasis added]: *Hilton Mobile Homes*, 155 NLRB 873, 874 (1965), modified on other grounds 387 F.2d 7 (8th Cir. 1967) (motion picture photographing not violative or Sec. 8(a)(1) "in all the circumstances," including absence of threats or actual reprisal).

[20] 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th cir. 1968), cert. denied 393 U.S. 1019 (1969).

[21] 234 NLRB 1309, 1320 (1978), remanded 592 F.2d 94 (2d Cir. 1979), supplemental decision 241 NLRB 348 (1979), enfd. 600 F.2d 3 (2d Cir. 1979). [*36]

picketing."); *U.S. Steel Corp.*[22] ("Absent legitimate justification, and employer's photographing of its employees while they are engaged in protected concerted activity unlawful surveillance"); *Waco Inc.*,[23] (" In the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate. Photographing lawful, peaceful picketing tends to implant fear of future reprisals." [Footnote citations omitted.])

In 1992, however, the Board reversed course, rejecting a judge's reliance on the principle that an employer violates Section 8(a)(1) by photographing employees engaged in protected concerted activity absent legitimate justification. *Sunbell Mfg. Inc.*,[24] Rather, where an employer videotaped organizational

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[22] 255 NLRB 1338 (1981), enf. denied 682 F.2d 98 (3d Cir. 1982).

[23] 273 NLRB 746, 747 (1984).

[24] 308 NLRB 780 fn. 3, enfd. in part, 996 f.2d 305 (5th Cir. 1993) (table) (cited with approval in *K-Mart Corp. v. NLRB*, 62 F.3d 209, 212 (7th Cir. 1995), supplemental decision, 322 NLRB 1014 (1997), enfd. 125 F.3d 572 (7th Cir. 1997)).

handbilling of employees at the plant's front gate, the Board ruled that,

> It is reasonable tendency under the circumstances which governs the inquiry in each case. Here, the Respondent's videotaping at the culmination of the election campaign, during which we have found that the Respondent unlawfully expressed antiunion animus by threatening to close the plant and reduce wages and unlawfully discharged a known union adherent, specifically revealed whether certain employees accepted or rejected campaign literature. In these circumstances, even though some employees actively sought publicity as memento, this purpose [*37] had not been explained to other employees, and we find that the Respondent's videotaping reasonably tended to interfere with, restrain, and coerce employees in the exercise of Sec. 7 rights. [Emphasis in original].[25]

Having set forth this declaration of the governing law, the Board, indeed the same three member panel of the Board, sub silentio overruled it less than 9 months later in *F. W. Woolworth Co.*, *supra* 310 NLRB 1197 (1993), and revived the presumption that employer photographing

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[25] Id.

and videotaping (in this case of off-duty employees who handbilled potential customers near store entrances to urge them to boycott the store during a labor dispute) [*38] is unlawful without "proper justification." The Board declined to follow the Third Circuit's opinion in *U. S. Steel Corp. v. NLRB*, 682 F.2d 98, *supra*, discussed hereafter, which had rejected the Board's presumptive approach to deciding photographing cases and followed the "in the circumstances" test.[26] The Board has also construed narrowly the "legitimate" or "proper" justification that an employer must provide to escape a finding of unlawful photographing or videotaping.[27]

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[26] Since 1993, the Board appears to have held steady in applying the per se formula to employer photographing of protected connected activity See *Dilling Mechanical Contractors, Inc.*, 318 NLRB 1140. 1150 (1995), enfd. 107 F.3d (7th Cir. 1997), cert. denied. 118 S.CL. 165 (1997); *Casa San Miguel Inc.*, 320 NLRB 534, 538 (1995); *Sonoma Mission Inn*, 322 NLRB 898, 902 (1997).

[27] Most cases of employer photographing involve picket line activity at a company facility. The board has held that "An employer may photograph strikers

who are engaged in violence rather than peaceful picketing in order to obtain or preserve evidence in connection with an application for a injunction," *Gopher Aviation, Inc.*, 160 NLRB 1698, 1717 (1996), enf. denied. 402 F.2d 176, 183-184 (8th Cir. 1968),; *Hilton Mobile Homer, supra*, 155 NLRB 873, 874 (1965), modified on other grounds, 387 F.2d 7 (8th Cir. 1967) (no violation where pictures were submitted as evidence in State court injunction proceeding); *Stork Ceramics, Inc.*, 155 NLRB 1258, 1269 (1965), enfd. 375 F.2d 202 (6th Cir. 1967) (no violation where purpose of picture taking to establish existence of mass picketing and violence in injunction action); but see *Lorand Leisurelies, Inc.*, 213 NLRB 197, 207 (1974), enfd 523 F.2d 814 (6th Cir. 1975) (violation where no pictures were presented in evidence). The Board has likewise found no unlawful surveillance by photographing when done to document trespass by union organizers engaged in handling, Berton Kirshner, Inc., 209 NLRB 1081 (1974), enfd. 523 F.2d 1046 *(9th Cir. 1975), or to* establish that a no-strike clause had been breached to support a petition for injunctive relief *Roadway Express, Inc.*, 271 NLRB 1238, 1244 (1984). And the Board has held that installation of a rooftop security camera on a retail store did not violate the Act, even though

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2. Union photographing

By contrast, in recent years, the Board has treated union contrast photographing differently depending upon whether an unfair labor practice or representation proceeding is involved, albeit without supplying any rationale for the distinction.

Where union photographing is alleged to violate Section 8(b)(1)(A), the Board has unitized an "all circumstances" approach. "The photographing of employees

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protected concerted activity was recorded, where general security purposes otherwise justified its presence. *Lechmere, Inc.*, 295 NLRB 92, 99-100 (1989), revd, on other grounds, 502 U.S. 527 (1992). Otherwise, absent actual violence or mass picketing, the Board has generally condemned employer photographing outright. *Flambeon Plastics Corp., supra*, 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969) (rejecting "anticipatory" photographing of picketing, in the event something "might happen"); Accord: *F. W. Woolworth Co., supra* 310 NLRB 1197 (1993); *Woco, Inc., supra*, 273 NLRB 746, 747 (1984).

by pickets . . . is not by itself violative of Section 8(b)(1)(A) of the Act. It is only when such conduct takes place in conjunction with other actions indicating that a union might react adversely to employees who honor a picket line that such conduct exceeds the boundaries of permissible action." *Interstate Cigar Co.*[28] Accord: Local Joint Executive Board of Las Vegas (Casino Royale, Inc.)[29] (8(b)(1)(A) violation where union actually or apparently videotaped employee working during picketing and where conduct accompanied by abusive remarks); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 695 (T. B. Wood's Sons Co.)[30] ((8)(b)(1)(A) violation where, in context of numerous, severe independent unfair [*40] labor practices, apparent photographing or videotaping of occupants of vehicles as they crossed picket line showed conduct was undertaken, "as a means of instilling fear of retribution in the minds of

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[28] 256 NLRB 496, 500-501 (1981).

[29] 323 NLRB 148, 161 (1997).

[30] 311 NLRB 1328, 1336 (1993).

replacement workers and/or others who did no support the strike").[31]

Until today, the Board had treated union photographing or videotaping in representation cases identically with employer conduct, to wit, as presumptive grounds for setting aside an election. In *Pepsi-Cola Bottling Co., supra*, 289 NLRB 736, a union official videotaped employees during a rally it held for 2 hours in front of the employer's plant the day before the election, including employees who were handed union literature [*41] as they left the premises. In setting aside the election, the Board concluded that, "Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election." Id. at 737. Likewise, in *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989), the Board relied on *Pepsi-Cola* to overturn an election where a union agent photographed campaign activity at the employer's front gate "virtually everyday

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[31] Also see: *Electrical Workers (IBEW) Local 3, (Cablevision)*, 312 NLRB 487 (1993).

during the campaign." The Board emphasized that, as in *Pepsi-Cola*, "no explanation was provided to employees while pictures were being taken to assuage their fears that the pictures would be the basis for future reprisals." Id.[32]

In *Net Skin International*, 307 NLRB 223 (1992), however, the Board overruled an employer's objections to union photographing during the critical period preceding the election. There union representatives look some 88 snapshots of employees on a union-sponsored picnic luncheon held during break time the day before election in a parking for adjacent to the plant. The Board found the picture taking "innocuous and entirely distinguishable" from that in *Pepsi-Cola* and *Mike Yurosek* Id. at 225. More specifically, the Board noted that

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[32] Although the Board noted an arguably threatening statement by a union representative in conjunction with the photographing ("We've got it on film; we know who you guys are ... after the Union wins the election some of you may not be here"), the existence of this evidence was not necessary to the result, as the context of the decision shows that it turned upon "the absence of a valid explanation" for the union conduct, Id.

attendance was voluntary and that, persistent with an explanation offered at event, union representatives stated at the hearing that the pictures were made for the union newspaper and for distribution to employees. Id. at 224-25. Pictures were in fact distributed to employees following the election. Id. The Board stressed, however, that the photographing in *Pepsi* and *Mike Yurosek* "might readily suggest retaliatory purpose."

[*42]

IV. THE MAJORITY'S DECISION

Against this background, the Board majority would now destroy any remaining consistency and symmetry in regulating photographing of employee activity by employers and unions. Before analyzing the law and reaching a conclusion, the majority's rationale for evaluating similar conduct by employers and unions differently must be examined.

My colleagues argue that Pepsi-Cola's general ban, in a pre-election setting, on union photographing of employees engaged in protected activity absent a "legitimate explanation" conflicts with precedent "permitting unions to ask employees directly whether

they support the union, to attempt to persuade employees to sign petitions in support of representation, and to record the employees' responses," citing *Springfield Hospital*,[33] *Kusan Mfg. Co.*,[34] and *J.C. Penney Food Department*.[35] In *Springfield Hospital* where the Board overruled an employer election objection, we utilized an "all the circumstances" approach to evaluate union conversations with employees about their sentiments and the recording of their responses on charts. The Board ruled there was no showing that these activities "occurred in a [*43] context of threats of reprisal or other coercive conduct attributable to the Union or to its supporters."[36] The Board relied on precedent, such as *J.C. Penney Food Department*, supra, upholding "noncoercive" preelection polling, while distinguishing cases like Graham Engineering,[37] where coercive conditions

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[33] 281 NLRB 643, 692-693 (1986), enfd. 899 F.2d 1305 (2d. Cir. 1990).

[34] 267 NLRB 740, 746 (1983), enfd. 749 F.2d 362 (6th Cir. 1984).

[35] 195 NLRB 921 fn. 4 (1972).

[36] 281 NLRB at 693.

[37] 164 NLRB 679, 695 (1967).

were present. The Board similarly emphasized the absence of coercive conduct in overruling an employer objection to union circulation of a prounion petition in *Kusan Mfg.*[38] Thus, as my colleagues acknowledge in their parenthetical descriptions of the holding of these cases, union's right to inquire about employees' attitudes toward unionization is limited to noncoercive situations. My colleagues, however, seek to justify applying a per se rule to employer but not union photographing by arguing that "an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment."[39] Without debating here the

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[38] 267 NLRB at 746.

[39] Such a statement is rhetoric rather than fact. Individual changes in terms and conditions of employment are subject to administrative and judicial scrutiny, and to assume that an employer case, for example, simply reduce wages broadly at will presupposes that its economic power is unchecked by the employment market in which it hires. Employment monopsonist were rare 50 years ago. H. C. Simons, Economic Policy for a Free Society 12 (1948). The market imperfections that allowed unchecked market power did not survive the end of

holding in *Plant City Welding & Tank Co., Inc.*[40] (barring employer home visits during the critical period preceding an election), relied on by my colleagues, I find Plant City's rationale overdrawn [*44] insofar as it suggest that unions "lack the relationship with the employees to interfere with their choice of representative thereby."

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company towns and the rise of worker mobility resulting from increased education, employment agencies, and temp agencies. See Richard H. Leftwich. The Price System and Resource Allocation 316-317 (rev.ed 1960). And absent a monopsony, an employer who arbitrarily reduced wages would suffer from the decreased ability to hire or retain workers (unless he was inadvertently paying above the market rate). Thus, although an employer might seem to have "virtually absolute control" over wages and working conditions, the consequences of adverse changes are not free; the employer who attempts to exercise that "control" will suffer the resulting market response. [*45]

[40] 119 NLRB 131, 134 (1957), motion granted, 275 F.2d 859 (5th Cir. 1960); remanded 281 F.2d 688 (5th Cir. 1960), revd. on other grounds, 133 NLRB 1092 (1961).

Section 8(b)(1)(A) of the Act, making it an unfair labor practice to restrain or coerce employees in the exercise of their Section 7 rights, was enacted in 1947 as part of Taft-Hartley Act reforms precisely because of the prevalence of union coercion, including coercion of employees in the course of representational drives. Thus, on April 25, 1947, Senator Ball described the purpose behind the addition of Section 8(b)(1)(A) to the Act. "The sponsors . . . believe that that kind of practice [threats of violence] by unions is in violation of the rights guaranteed to employees in Section 7, just as it is a violation when an employer directly or indirectly threatens his employees with dismissal if they join a union." [Emphasis added][41]

[*46]

A little later in the debate, my colleagues' contention was specifically raised and rejected.

MR. PEPPER . . . We do not want to make it an unfair labor practice to prevent a man from being beaten up. . . .

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[41] II NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1018.

Is there not a difference between that case and the case of an employer who has the power of life and death, the power of holding a man's job in his hands?

MR. TAFT, I Cannot see any difference. If a man is invited to join a union its member ought to be able to persuade him to join, but if they should not be able to persuade him they should not be permitted to interfere with him, coerce him, and compel him to join the union. The moment that such a man is threatened with losing his job if he does join, it at once becomes an unfair labor practice. Threats and coercion ought to become unfair labor practices on the part of a union. [Emphasis added.][42]

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[42] Id. at 1027. Other pertinent comments from the legislative history include:

> SENATOR TAFT: The [Union] leaders who attempt to coerce [employees] may not have anything to do with the plant in which the employees in question work. Sometimes the union has not even govern into the plant when they begin to coerce employees of the plant . . .Coercion is not merely against union members, it may be against

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Stated differently, the Taft-Hartley Congress recognized that employer and union coercion were both evils deserving of proscription, and that the only difference consisted in the means traditionally employed by each side to that end.[43]

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all employees. Id. at. 1030.

SENATOR BALL: The individual employee is very likely to be easily influenced by on hint of coercion on the part of a union organizer. . . . Id. at 1203.

[43] Senator Taft explained:

The present section [of the Act] against employers has been used by the Board to prevent employers from making threats to employees to prevent them or dissuade them from joining a labor union. They may be threats to fire the man, of course, in the extreme case. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union.

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Reviewing in 1961, the same legislative history, the Supreme Court concluded:

Congress added § 8(b)(1)(A) to the Wagner Act, prohibiting, as the Court of Appeals held, 'unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a)(1)'. .

> Those are the usual types of coercion which have been held to be a violation of the action on the part of the employers. . . .
>
> In the case of unions, in the first place, there might be a threat that if a man did not join, the union would raise the initiation fee to $300, and he would have to pay $300 to get in; or there might be a threat that if he did not join, the union would get a closed shop agreement and keep him from working at all. Then, there might be a threat of beating up his family or himself if he did not join and sign a card. . . . Id. at 1205.

. . It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights. [Footnote omitted.]

International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB.[44] Similarly, the D.C. Circuit has declared that, "The sponsors of the Taft-Hartley Act, in explaining their proposed legislation, focused primarily on the need to control union violence and economic coercion. . . . It appears that Congress intended Section 8(b)(1)(A) to cover a range of conduct as broad as that covered by Section 8(a)(I)." *Helton v. NLRB.*[45] And the Board early on said: "The legislative history [of the Taft-Hartley Act] strongly suggests that Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions [*49] of threats of economic action against specific individuals in an effort to compel them to join." *National*

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[44] 366 U.S. 731, 738.

[45] 656 F.2d 883, 888 (1981).

Maritime Union.[46] Later, the Board explicitly endorsed the Helton court's analysis of the legislative history in *Flatbush Manor Care Center*.[47]

Threats, intimidation, violence, mass picketing, and other such forms of physical coercion are always available to a union seeking to organize employees, whether or not it is ever certified as a bargaining agent.[48] But so is the

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[46] 78 NLRB 971, 985 (1948), enfd. 175 F.2d 686 (.2d Cir. 1949), cert. denied. 338 U.S. 954 (1949), petition for rehearing denied 339 U.S. 926 (1950).

[47] 287 NLRB 457, 464 (1987).

[48] See, e.g., *Smithers Tire and Automotive of Texas, Inc.*, 308 NLRB 72 (1992) (union agent's threat of physical harm, objectionable); *Fruehauf Corp.*, 274 NLRB 403, 408-409, 412 (1985) (threat by union business agent to majority of unit employees that anyone crossing a picket line would be shot, grounds for setting aside election).

For an in depth study, see Armand J. Thieblot, Jr. and Thomas R, Haggard, Union Violence: The Record and the Response by Courts, Legislature, and the NLRB (1983). [*51]

"economic coercion" referred to in the legislative history.[49] It is another reason why the "union as [*50] important outsider" theory is misconceived. According to the most recent published statistics, for FY 1998, unions won just over 50 percent of initial representation elections.[50] When a union succeeds in a plant vote, it becomes the employees "exclusive representative," under Section 9(a) of the Act, "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." This invests the labor organization with wide authority over those whom it represents: "As collective bargaining agents, unions help determine when a man shall work, what he shall do, how much he shall make, when he shall have holidays and the terms on which he shall retire. As exclusive representative, the union alone speaks for him in obtaining these terms, and he can speak only through the union. Even his personal grievances are not free of the union's controlling hand."[51]

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[49] See, e.g., Senator Taft's comments quoted at fn. 43, supra.

[50] 63 NLRB Ann. Rep. 160 (1998).

[51] *Clyde W. Summers, Union Powers and Workers Rights,* 49 Mich. L. Rev. 805,

The likelihood of misconduct by an incumbent union is such that the Supreme Court and the Board have fashioned a nonstatutory duty of fair representation as a safeguard against hostile or arbitrary actions by a union against those working lives are within its power. "The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility [*52] of equal scope, the responsibility and duty of fair representation." *Humphrey v. Moore*, 375 U.S. 335, 342 (1964), and authority there cited. "A statutory representative under this Act . . . exercises a grant of powers 'comparable to those possessed by a legislative body' and must, as stated in *Steele v. Louisville & Nashville Railroad Co.*, et al., 323 U.S. 192, 202, 'give equal

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815 (1951). Elsewhere in his article, Prof. Summers comments: "Unions, under the protection and authority of the law, govern the lives of individual workers, controlling their jobs, regulating their conduct, and determining their economic welfare. Unions are the workers economic government, and only through them can individuals have any voice in making the laws under which they work." Id, at 837-838.

protection to the interests of those for whom it legislates.'" [citations omitted]. *Miranda Fuel Co.*, 140 NLRB 181, 184-185 (1962), enf. denied, *326 F.2d. 172 (2d Cir. 1963)*.[52]

Thus, during the phase in which a union seeks to acquire exclusive status, the employees of the still unorganized employer are well aware that there is a substantial likelihood that the union will prevail and, cloaked [*53] with its power under section 9(a) of the Act, be able to exert considerable authority over employees' daily economic life. Accordingly, nonviolent union threats to take action should it enter the plant are meaningful. A good example is *Mike Yurosek & Son, Inc., supra*, 292 NLRB 1074, discussed previously, where a union representative taking pictures of campaign activity told an antiunion employee that, "We've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here."[53]

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[52] II. Hardin, The Developing Labor Law, supra, at 1442-1471, describes the nature of the duty and its application in various settings.

[53] Also see: *Bajo's Place, Inc.*, 268 NLRB 868 (1984) threat by union agent

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Nonetheless, my colleagues contend that the Board treats differently employer and union "polling," and should likewise judge photographing by employers and unions by separate standards. As the majority points out, under Board law, an employer poll is prohibited while a representation petition is pending, because such a poll cannot serve a legitimate employer interest in circumstances when an election is scheduled independently to determine employee sentiment. *Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967). The rule is appropriate because conduct engaged in by an employer that

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to get employee's job, objectionable); *United Broadcasting Co.*, 248 NLRB 403 (1980) (threat to "blacklist" employee if he did not support union, grounds for setting aside election); *Westside Hospital*, 218 NLRB 96 (1975) (union organizer's threat of deportation to Spanish-speaking employee violative of 8(b)(1)(A) and objectionable); also see *Electronic Components Corp. v. NLRB*, 546 F.2d 1088, 1093 (4th Cir. 1976) (court ordered hearing on objections because, "Employees might have feared that the Union could have them fired if it gained representative status in the future.").

lacks a legitimate purpose would reasonably tend to raise a fear of retaliation in employees' minds.[54]

On the other hand, what is generally referred [*55] to as union "polling" is not polling in the same sense. All three court cases relied on by my colleagues involved circulation of union-sponsored petitions among employees calling either for support of the organizing union, *Kusan Manufacturing Co. v. NLRB*, 749 F.2d 362 (6th Cir. 1984) and Maremont Corp. v. NLRB, 161 LRRM 2338 (6th Cir. 1999), or for an early election, *Louis-Allis Co. v. NLRB*, 463 F.2d 512 (7th Cir. 1972). In each case, the court correctly upheld the Board's overruling of employer objections to an election based on the noncoercive nature of the union's conduct in connection with the petitions. I cannot, however, agree with language in these cases, cited by my colleagues, which suggests that the application of different standards of conduct to employers and unions is justified by

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[54] In contrast to casual questioning, "polling" involves "situations where the employer's actions have a broader, more systematic and more deliberate character." *Allegheny Ludhum Corp. v. NLRB*, 104 F.3d 1354, 1360 (D.C. Cir. 1997).

allegedly greater coercive power wielded by employers over employees. Such a position is irreconcilable with the legislative history and court decisions interpreting it previously recited. Rather, where no coercive circumstances exist, a union's circulation of a petition is just another traditional means [*56] of gathering support by persuasion that Congress did not intend to restrict.

The distinction is drawn by the D.C. Circuit, in *Helton v. NLRB, supra*, 656 F.2d at 889, in explaining why the words "interfere with" do not appear in Section 8(b)(1)(A) of the statute, which limits union conduct, as they do in Section 8(a)(1),limiting employer conduct:

> Omission of the words 'interfere with' from Section 8(b)(1)(A) was not intended to indicate that union conduct should be measured against a less demanding standard than employer conduct. The legislation as originally proposed contained these words. They were deleted because it was feared that they would unduly restrict union organization campaigns, they might be 'construed to mean

> that any conversation, any persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice.'

The act of photographing employees during the course of an organizational campaign is not itself an activity that involves persuasion to join a labor organization, and neither photographing on the part of union or an employer should be presumptively [*57] illegitimate.

The reliance of my colleagues (and of the Louis-Allis court) on the following statement in *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969) is wholly inapposite: "An employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant." In *Golden Age*, the count simply upheld the Board's overruling of an employer objection alleging that promises of improved wages, if the union won, warranted setting aside the election. Drawing a distinction

between employer and union preelection promises of benefit is common sense, as the Board has long recognized: an unorganized employer has the unilateral ability to change the wages and other terms and conditions of employment of its employees, while a nonincumbent union has no say in such matters.[55] Thus, to the extent that *Golden Age* is invoked to imply that, during an organizational campaign, a union is comparatively powerless to affect employee rights, the argument is misconceived.

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[55] See, e.g., *The Smith Co.*, 192 NLRB 109, 1101 (1971), enfd. in pertinent part in unpublished opinion (9th Cir. Feb. 14, 1974), aff'd. 200 NLRB 772 (1972), reaff'd 215 NLRB 530 (1974) ("Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieves them through collective bargaining. Union promises of the type involved herein are easily recognized by employees to be dependent on contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits.").

In short, neither reality, law, nor logic can support the view that a union is "merely an outsider seeking entrance to the plant," which, in contrast to the employer, lacks the ability to coerce employees and hinder their exercise of rights protected by the Act. Both parties possess the potential for exercising some degree of power over employees, albeit in different forms. The majority, however, has articulated no reasoned basis for creating a "double standard" that presumptively condemns photographing of employees taking part in protected concerted activity by an employer, but not the same conduct undertaken by a union.[56]

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[56] My colleagues' reliance on certain language in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) is misplaced. The Court there referred to a balance that must be drawn between an employer's free speech right and employee Sec. 7 rights, noting that any such balance "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." The Court, as the context of the quotation shows, was

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V. THE PROPER LEGAL STANDARD

The remaining question is whether photographing should be presumptively deemed unlawful or objectionable when engaged in by each side, or whether an "all the circumstances" approach should be used irrespective of the identity of the party taking the pictures.

The starting point is the general standard for evaluating an allegation of conduct violating Section 8(a)(1). "To establish a violation of section 8(a)(1), the Board's General Counsel must establish that, under all of the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees." [Emphasis added]. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039,

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endeavoring to provide guidance on when employer speech crosses the line separating protected expression under Sec. 8(c) from unlawful threat under Sec. 8(a)(1). The Court was not comparing common means of coercion respectively used by employers and unions, nor addressing, as we are here, the legal significance of similar conduct when engaged in by one or the other side.

1044 (4th Cir. 1997).[57] As observed at the outset, unlawful photographing of employees is regarded as a form of surveillance or creation of the impression of surveillance. "The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is 'an objective one and involves the determination of whether the employer' s conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees [*60] in the exercise of their rights guaranteed under Section 7 of the Act.'" [Emphasis added.] *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 938 (4th Cir. 1990), Stated otherwise, "Section 8(a)(1) of the Act does not prescribe all surveillance of employee activities by the employer. The only surveillance, or impression of surveillance, which the Act prohibits is that which tends to interfere with, restrain, or coerce Union

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[57] Accord: *NLRB v. American Chain Link Fence Co.*, 670 F.2d 1236, 1241-1242 (1st Cir. 1981); *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 178-179 (2d Cir. 1965); *NLRB v. Armcor Industries*, 535 F.2d 239, 242 (3d Cir. 1976); *U.S. Steel Corp. v. NLRB, supra*, 682 F.2d 98, 101 (3d Cir. 1982); *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 105 (5th Cir. 1963).

activities." [citations omitted]. *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 708 (5th Cir. 1975).

[*61]

The application of this fact-based approach to a surveillance allegation is illustrated by the court's decision in *NLRB v. Computed Time Corp., 557 F.2d 790, 794-795 (5th Cir. 1979)*. The evidence showed that a low-level supervisor, without the authorization or even knowledge of the company, attended a union organizational meeting. The supervisor learned of the meeting through general leafleting of employees, and a union representative invited him to stay even after he inquired whether his presence at the meeting was illegal. Without other evidence of coercion, the Board found a violation in the underlying case by applying a per se rule: "The presence of management representatives at union functions has an inherent tendency to impede employees in the exercise of their self-organization right."[58] The court, however, reversed, and concluded that "the Board did not have evidence establishing coercion sufficient to make

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[58] 228 NLRB 1243, 1245 (1977).

out a violation of Section 8(a)(1) of the Act."[59]

[*62]

The Fifth Circuit's mode of analysis in Computed Time was followed in a situation involving photographing as surveillance in *U.S. Steel Corp. v. NLRB, supra* 682 F.2d 98 (3d Cir. 1982). The Board had applied its usual standard of presumptive illegality in finding a violation: "It is well established that, absent legitimate justification, an employer's photographing of its employees while they are engaged in protected concerted activity constitutes unlawful surveillance."[60] The court rejected the Board's "assumption that, without regard to the particular facts of the case, photographing of protected activity constitutes a per se violation of section 8(a)(1)":[61]

It is sufficient, as the Board stated, that the employer's conduct, 'may reasonably tend to coerce or intimidate' employees in the exercise of [protected]

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[59] 587 F.2d at 795.

[60] 255 NLRB 1338 (1981). [*63]

[61] 682 F.2d at 101.

rights . . . The Board failed to recognize, however, that it is a reasonable tendency under the circumstances which governs the inquiry in each case. Consequently, the Board did not examine the factual setting of this case in reaching its conclusion that petitioner's surveillance was unlawful.[62]

The court in U.S. Steel observed that the Fifth Circuit in Computed Time had "rejected the Board's per se doctrine," and had held that surveillance was unlawful 'because it indicates an employer's opposition to unionization' and leads employees to think they are 'under the threat of economic coercion, retaliation, etc.'" [citations omitted].[63] In *U.S. Steel*, 50-75 union-represented employees took part in a 2-hour demonstration in support of grievances filed involving "the adequacy of locker room facilities made available for their use."[64] The employer used two photographers, who took some 140 pictures, including close-ups of participants, to record the event. Some employees carried picket signs. There was

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[62] Id.

[63] Id.

[64] Id. at 99.

no violence or other illegal activity connected with the event. Nor did the employer discipline any employee, commit any independent unfair labor practice, or take any legal action. The photographing was done on the advice of counsel, and had been undertaken during 13 earlier demonstrations at the plant over the preceding [*64] eight years. In the circumstances, the court found that the employer's conduct did not "reasonably tend to interfere with, restrain, or coerce employees in the exercise of their section 7 rights."[65]

The evidentiary effect of the Board's per se rule has been summarized as follows:[66]

> Where the Board makes out a prima facie case, the burden of going forward with the evidence shifts to the respondent. If the respondent fails to come forward with any evidence, the

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[65] Id. at 103.

[66] Russell J. Davis, Annotation, Photographing of Employees' Concerted Activity as Constituting Unfair Labor Practice Under § 8(a)(1) of the National Labor Relations Act, 45 A.L.R. Fed. 148, 154 (1979).

> General Counsel has sustained his burden of proof on the issue. In a case involving alleged photographing of employees' concerted activity . . . the act of photographing is itself considered to have a tendency to interfere or coerce, and thus violate § 158(a)(1), [thus] there is no requirement that the General Counsel present independent evidence showing that the taking of pictures was done in such a manner as to intimidate or coerce the employees, such as by making intimidating statements to picketers. . . [*65] .Once the act of photographing of a protected concerted activity has been proved, the burden shifts to the employer to demonstrate a justification for its photographic surveillance. . . ."

In my view, this procedure conflicts with the Board and counts' customary approach, outlined above, in cases involving allegations of Section 8(a)(1) conduct, of analyzing whether the conduct in question had a reasonable tendency in the circumstances to interfere with,

restrain, or coerce employees in the exercise of Section 7 rights. The latter inquiry proceeds without according the General Counsel the benefit of a presumption that given conduct has a reasonable tendency to impact employee rights, and compelling the respondent to present contrary evidence.

As outlined in section II,B,2., of this [*66] opinion, the Board has historically judged union photographing conduct alleged to violate Section 8(b)(1)(A) under "all the circumstances," rather than starting with a presumption of illegality. *Interstate Cigar, supra*, 256 NLRB at 500-501. Utilizing an "all the circumstances" rather than a "per se" approach in cases of alleged unlawful photographing is firmly supported by analogy to Board and court cases involving alleged unlawful interrogation of employees. In *Rossmore House*, 269 NLRB 1176, 1176-1177 (1984), affd. sub nom, *Hotel Employees Union, Local II v. NLRB*, 760 F.2d 1006 (1985), the Board abandoned its per se rule in this area, as described in *Paceco*:[67] "An interrogation of an employee's union

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[67] 237 NLRB 399, 400 (1978), vacated in part and remanded in part, 601 F.2d 180 (5th Cir. 1979), supplemental decision, 247 NLRB 1405 (1980).

sympathies or his reasons for supporting a union need not be uttered in the context of threats or promises in order to be coercive. The probing of such views, even addressed to employees who have openly declared their prounion sympathies, reasonably tends to interfere with the free exercise of employee rights under the Act, and, consequently, is coercive." The Board in *Rossmore House* [*67][68] noted that, in a subsequent case, PPG Industries,[69] had applied the rule even to questioning of "open and active" union adherents. The Board concluded that "PPG improperly established a per se rule that completely disregarded the circumstances surrounding an alleged interrogation and ignored the reality of the workplace."[70]

Instead, the Board followed the view of ate Seventh Circuit quoting[71] from the court's opinion in *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (1980), "It is well established that interrogation of employees is not illegal per se. Section

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[68] 269 NLRB at 1177.

[69] 251 NLRB 1146 (1980).

[70] 269 NLRB at 1177.

[71] 269 NLRB at 1177.

8(a)(1) of the Act prohibits [*68] employers only from activity which in some manner tends to restrain, coerce, or interfere with employee rights. To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference."

In affirming the Board in Rossmore House, the Ninth Circuit declared, "A standard which considers the totality of the circumstances surrounding an employee interrogation is a realistic approach to the enforcement of section 8(a)(1). It is a standard that is consistent with the Act because the Board and the administrative law judges can determine, on a case-by-case basis, whether all the facts demonstrate coercive behavior." *Hotel Employees Union v. NLRB*, 760 F.2d 1006, 1009 (1985). The court's reasoning is sound; I see no justification for not applying it to photographing when, following *Rossmore House*, other forms of conduct that may constitute an 8(a)(1) violation are judged under the same standard.[72] [*69]

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[72] As pointed out previously, the Board has at times itself applied the "all the circumstances standard to photographing, *Sunbelt Mfg., Inc., supra*, 308 NLRB 780 fn. 2, enfd. in part 996 F.2d

As with interrogations, however, photographing and videotaping occur in a multiplicity of circumstances. To aid in evaluation of the coercive effect of incidents involving [*70] alleged interrogation, the Second Circuit, in 1964, developed a set of widely accepted

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305 (5th Cir. 1993) (table); *Tennessee Packers, Inc., supra*, 124 NLRB 1117, 1123 (1959); *Hilton Mobile Homes, Inc., supra*, 155 NLRB 873, 874 (1965), modified on other grounds 387 F.2d 7 (8th Cir. 1967) table); *F. W. Wool-worth Ca., supra*, 310 NLRB 1197, 1198 (1993) (Member Oviant's dissent); see also *Clock Electric, Inc. v. NLRB* 162 F.3d 907, 919-920 (6th Cir. 1998) (Judge Wellford's dissent); see general cases cited in fn. 57, supra, and accompanying text.

criteria[73] that became known as the Bourne factors:[74]

(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e. how high was he in the company hierarchy?

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[73] "Virtually every Circuit Court of Appeals has adopted, explicitly or implicitly, the Bourne factors and we think that these factors supply the proper starting place for judicial and administrative analysis of whether particular employer questioning was in the totality of circumstance 'coercive' or merely persuasive." *Chauffeurs, Teamsters, and Helpers, Local 633 of New Hampshire*, 509 F.2d 490, 494 (1974). [footnotes omitted]: *Rossmore House, supra*, 269 NLRB at 1178 fn. 20. [*71]

[74] *Bourne Co. v. NLRB*, 332 F.2d 47, 48.

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality?"

(5) Truthfulness of the reply.

I believe the following standards would be useful in judging whether the circumstances surrounding an act of photographing or videotaping are coercive, either in violation of Section 8(a)(1) or 8(b)(1)(A), or objectionable when done by either an employer or union.

(1) Whether the photographing occurred in the context of serious independent unfair labor practice conduct or unalleged threats of physical or economic reprisal, intimidation, or actual violence.[75]

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[75] See, e.g., *Hudson Hosiery Co.*, *supra*, 100 NLRB 1410, 1410-1411 (1964) (threat of discharge contemporaneous with photographing of picketing employees); *Preston Feed Corp.* *supra*, 134 NLRB 629 (1961), enf'd. 309 F.2d 346 (4th Cir. 1962) (photographing of pickets on unfair labor practice strike to protest discharge of leading union activist; numerous other illegal acts, including discriminatory subcontracting of unit work); *Larrand Leisureties, Inc.*, 213 NLRB 197 (1974),

(2) Whether the activity photographed was carried on in an open

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enf'd. 523 F.2d 814 (6th Cir. 1975) (photographing of picketers on unfair labor practice strike, numerous independent violations, including reprimands and threats of discharge to 90 employers); *Mike Yurosek & Son, Inc., supra*, 292 NLRB 1074 (1989) (union photographing of campaign activity at plant gate; threat to antiunion activist that employees opposed to union "may not be here" after election); *United Automobile Workers of America, Local 695 (T.B. Wood's Sons Co.), supra*, 311 NLRB 1328, 1336 (1993) (photographing occupants of vehicles crossing picket line in context of numerous independent 8(b)(1)(A) violations, including mass picketing, threats to rape and kill, and physical assaults); (*Sunbelt Mfg., Inc., supra*, 308 NLRB 780 (1992), enf'd. in part 996 F.2d 305 (5th Cir. 1993) (table) (videotaping of employee organizational handbilling in context of unlawful threats of plant closure and wage reduction and unlawful discharge of union activist); *Dilling Mechanical Corp.*, supra, 318 NLRB 1140 (1995) (photographing of informational and unfair labor practice strike picketers, numerous and serious other unfair labor practice, including threats of discharge and actual discharges). [*72]

and public way, including whether the activity involved trespass.[76]

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[76] In a related context, the Board has found no unlawful visual surveillance where employees carry on their protected activities openly. See, e.g., Roadway Package System, Inc., 302 NLRB 961 (1991) (open handbilling outside plant entrance); (*Harry M. Stevens, Inc., supra*, 277 NLRB 275, 276-277 (1985) (open distribution of union literature in sales area); *Chemtronics, Inc., supra*, 236 NLRB 178 (1978) (open card solicitation on employer parking lot); see also: *NLRB v. Southern, Maryland Hospital Center v. NLRB, supra*, 916 F.2d 932, 939 (4th Cir. 1990) (degree of surveillance irrelevant, where employer has right to bar union from premises).

In addition, as noted, in judging whether interactions between management and employees constitute unlawful interrogation, the Board lays particular emphasis on whether the individuals subject to questioning is an "open and active" union supporter; if so, the Board is less likely to find an unfair labor practice has been committed. *Rossmore House, supra*, 269 NLRB 1176, 1176-1177 (1984), aff'd. sub nom. *Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). [*73]

(3) Whether the photographing took place at the employer's premises, at the union hall or a union sponsored event, or at a location unconnected with either party.[77]

(4) Whether the photographing was done in a "conspicuous" manner that would suggest it was intended as a preclude to reprisal.[78]

(5) Whether the party photographing the activity had a "legitimate" or

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[77] *Porta Systems Corp.*, 238 NLRB 192 (1978), enf'd. 625 F.2d 399 (2d Cir. 1980) ("The Board has held [in visual surveillance cases] that 'union representatives and employees who choose to engage in their union activities at the Employer's premises should have no cause to complain that managements observes them." [footnote omitted].

[78] *The Udylite Corp.*, 183 NLRB 163, 172-173 (1970), enf. denied in part and remanded on other grounds, 455 F.2d 1357 (D.C. Cir. 1971); *Rainbow Garment Contracting*, 314 NLRB 929, 931, 936-937, (1994).

"proper" justification as previously recognized by the Board.[79]

What the D.C. Circuit has said of the Bourne standards applies equally to these criteria: "Determining whether employee questioning violates the Act does not require strict evaluation of each factor; instead the flexibility and deliberately broad focus of this test make clear that the Bourne criteria are not prerequisites to a finding of coercive questioning, but rather [*74] useful indicia that serve as a starting point for assessing the totality of the circumstance." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (1998) (internal quotation marks omitted), quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

In many if not most cases alleging unlawful or objectionable photographing or videotaping, application of "Randell" factors will not result in an outcome different than under the per se rule, either because analysis will point to the presence of coercive circumstances, or because the party's justification would be valid even within existing precedent. But the "all the circumstances" approach

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[79] See discussion of cases in fn. 27, supra.

is inconsistent with cases like *Waco, Inc., supra*, 273 NLRB 746 (1984), applying the principle that photographing in anticipation of possible misconduct is unlawful irrespective of the context. In Waco, the employer on a single occasion photographed picketing by several discharged employees and two non-employees. The Board found the employer had committed two other relatively minor unfair labor practices.[80] The picketing was carried on openly near [*75] the plant entrance. There was no evidence the photographing was "conspicuous," but neither does it appear that any justification for it was given. The judge, whom the Board reversed for not applying the per se rule against photographing, found that, "At no time were the pickets asked to move. Nor were they threatened, arrested, or otherwise interfered with." *Id. at 753*. The first four Randell standards thus favor finding no reasonably tendency to coerce

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[80] The Sec. 8(a)(1) violations included admonishing employees, unaccompanied by threats to discipline or discharge, not to discuss their wages among themselves, and requiring an employee to remove a union sign from the wall outside the plant lunchroom when it had permitted the posting of other notices.

employees; the fifth leans in the opposite direction. Accordingly, like the judge and contrary to the Board in Waco, I would find no violation of the Act in such circumstances.

Likewise, *Pepsi-Cola Bottling Co., supra*, 289 NLRB 736, [*76] which used the per se approach in the context of objections filed against a union, would require a different result. In Pepsi, as noted, during a 2-hour union rally staged the day before the election in front of the Employer' s plant, union representatives videotaped employees as they were offered union leaflets when leaving the plant in their vehicles. Without any evidence of threats, intimidation, violence, or other coercive conduct, the Board found that "employees could reasonable believe that the Union was contemplating some future reprisals against them," and sustained the employer's objection. Id. I cannot agree that this is a valid inference to be drawn from the mere act of videotaping employees being offered union literature, and I would have overruled the objection. There were no independent unfair labor practices or threats; the activity photographed was open and public. The photographing was not "conspicuous." The location, near the employer's facility entrance, is not significant in the

circumstances. Only failure to provide a "legitimate justification" for the act tends toward finding the photographing coercive; standing alone, however, it is insufficient. As stated, [*77] I would reverse Pepsi and abandon the per se test as applied to union as well as employer photographing and videotaping.[81]

Similarly, in the instant case, I would reverse the hearing officer where the evidence shows no more than that a union agent took pictures of employees leaving the employer's facility and being offered flyers by other union representatives. The Randell factors line up the same way they do in *Pepsi-Cola*. I can find nothing coercive or sinister in one leafleter's reply, when asked by an employee why pictures were being taken: "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run."

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[81] As previously observed the Board apparently has applied the "in the circumstances" standard to union photographing where a violation of Sec. 8(b)(1)(A) is alleged, while, heretofore using the per se approach to objections alleging election interference by conduct.

In all cases, the burden should be on the General Counsel [*78] or the objecting patty to make a prima facie case of coercive conduct, without use of presumptions. The ultimate question should be whether the conduct, in the circumstances, may reasonably tend to instill in the minds of the employees photographed a fear of economic or physical reprisal.

CONCLUSION

For the reasons set out above, I am persuaded that an "all the circumstances" approach in this area is more consonant with the Board and courts' traditional method of analysis in Section 8(a)(1) cases. And it is consistent with the way the Board has treated Section 8(b)(1)(A) cases involving photographing.

In candor, I cannot assert that using a rule that condemns photographing or videotaping, unless accompanied by a "legitimate" or "proper" justification, is an inadmissible interpretation under the Act, if applied to both employer and union conduct and to both unfair labor practice proceedings and representation proceedings.[82] But what I do not find

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[82] I am of course not unaware that several courts of appeal have deferred to

defensible, as discussed, is the Board's fashioning of a blatant "double standard" under which employer photographing or videotaping is judged as presumptively unlawful or objectionable, while similar union conduct is evaluated "under the [*79] circumstances." It is this aspect of my colleagues' decision that is most likely to invite skeptical scrutiny from reviewing courts.[83]

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the Board's application of the presumptive rule of illegality in cases involving employer photographing or videotaping. See *National Steel and Shipbuilding Co. v. NLRB*, 156 F.3d 1268 (D.C. Cir. 1998); *Road Sprinkler Fitters Union (John Cuneo, Inc.)*, 681 F.2d 11 (D.C. Cir. 1982); *Clock Electric, Inc., supra*, 162 F.3d 907, 917-918 (6th Cir. 1998); *NLRB v. Larand Leisureties, Inc. v. NLRB*, 523 F.2d 814, 819 (6th Cir. 1975); *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 700-703 (7th Cir. 1976); *California Acrylic Industries, Inc. v. NLRB* 150 F.3d 1095, 1098-1100 (9th Cir., 1998); *Kallmann v. NLRB*, 640 F.2d 1094, 1098 fn. 5 (9th Cir. 1981).

[83] Note the Supreme Court's rejection of using a per se rule and a rule of reason to judge comparable types of conduct. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977).

[*80]

Thus, the D.C. Circuit recently reversed the Board where it had overruled an employer's objection alleging that the petitioning union had interfered with an election by granting a benefit to employees. *Freund Baking Co. v. NLRB*, 165 F.3d 928 (1999). In *Freund*, the day before the voting, the union announced to employees the filing, on their behalf, of a class action lawsuit seeking back wages from the employer for violation of state overtime requirements. The court observed that, "Just as the Act prohibits an employer from using threats or rewards as campaign tactics, it bars both crude and subtle forms of vote-buying on the part of the union." Id. at 931. The court stated that the union's "sponsorship of the employees lawsuit against the Company clearly violated the rule against providing gratuities, and that, "The Board's justifications for making an exception to the anti-gratuity rule for a union's provision of legal services is not based upon any reasonably defensible construction of the Act." Id. at 935.

Likewise, as regards making findings of supervisory status that tend to improperly favor [*81] the position of labor organizations, the Second Circuit, among other courts, has been critical:

"The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decision in this area." [citations from other circuits omitted]. *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997); *New York University Medical Center v. NLRB*, 156 F.3d 405, 412 (2d Cir. 1998) Also see *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 339 fn. 8 (4th Cir. 1998).

We would be wise to recall the words of Judge van Graafeiland, in his separate opinion in *NLRB v. Porta Systems, Inc.*, 625 F.2d 399, 405 (2d Cir. 1980): "The Board is obligated to administer the Labor Management Relations Act fairly and rationally and to act as an impartial and neutral referee, guarding the rights of both employer and employee. It should not act arbitrarily, nor 'treat similar situations in dissimilar ways.'" [Footnotes omitted.] Accord: *Aramark Corp. v. NLRB*, Nos. 97-9535, -9550, slip op. at 23 (10th Cir. May 28, 1999); *Burinskas v. NLRB*, 357 F.2d 822, 826 (D.C. Cir. 1966). [*82]

The Supreme Court has also recently remind us that "adjudication is subject to the requirements of reasoned decisionmaking." *Allentown Mack Sales and*

Service, Inc. v. NLRB, 522 U.S. 359 (1998).

Because the legislative history of the Act demonstrates that Congress was equally concerned with coercion and intimidation of employees, economic and physical, whether practiced by employers or labor organizations, I cannot join my colleagues in fashioning a rule that would judge comparable factual situations differently. Whether a case involves photographing or videotaping by an employer or a union, rather than applying dubious presumptions, I would evaluate the actual evidence in light of all the circumstances to gauge its impact on employee rights. And I would apply the same yardstick to the facts in either situation. Because I find the union's photographing of employees did not reasonably tend to interfere with their right to a free and uncoerced choice in the election, Petitioner should be certified.

Dated, Washington, D.C. July 27, 1999

J. Robert Brame III, Member

DISSENT BY: HURTGEN

DISSENT:

Member Peter J. Hurtgen, dissenting.

My colleagues have overruled established Board precedent, [*83] and they have reversed the considered judgment of the hearing officer. I would do neither.

Under established precedent, unions engage in objectionable conduct when they photograph employees who are engaged in Section 7 activity, absent a legitimate explanation given to the employees.[1] My colleagues offer no empirical justification for this overruling of precedent. I would uphold the precedent.

The hearing officer applied this established precedent, and found objectionable conduct. My colleagues offer no evidentiary basis for reversing the hearing officer. I would affirm.

More particularly, the Union engaged in objectionable conduct by photographing employees (leaving the plant) as they were being offered literature by Union representatives. The Union's activity permitted it to record permanently whether or not employees accepted the

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[1] *Pepsi-Cola*, 289 NLRB 736 (1988).

Union's materials. In these circumstances, employees would reasonably fear that this permanent record could be used against [*84] them in the future. Accordingly, such conduct is objectionable.

It is clear that the Union did not adequately explain its photographing of employees. Indeed, the explanation, such as it was, was offered to only one employee and was simply as follows:

It's for the Union purpose showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run.

In my view, the words "It's for the Union purpose" would raise a reasonable concern in an employee's mind about what that Union purpose was and how a permanent record of employee reaction would be utilized for that purpose. Thus, as in *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989), the photographing was accompanied by a statement that can reasonably be regarded as intimidating.[2]

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[2] By contrast, In *Nu Skin International*, 307 NLRB 223 (1992), the union gave an innocent explanation for the photographing. Further, the photographing occurred at a union picnic that was

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Further, even if the statement is not intimidating, it is an ambiguous message that explains little.[3] Thus, it does not meet the test of *Pepsi-Cola*. As noted, that case teaches that photographing of Section 7 activity is lawful only if an adequate explanation is given. The muddled message here is not adequate.[4]

My colleagues are apparently aware that the explanation was inadequate. Accordingly, they overrule Pepsi Cola. I would not do so.

In support of their overruling of Pepsi Cola, my colleagues rely on

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voluntarily attended by employees.

[3] Even my colleagues concede that it is "not wholly free from ambiguity".

[4] My colleagues go to some lengths to say that unions have legitimate reasons for photographing employees. My colleagues thereby miss my point. I am not suggesting that unions cannot photograph employees. I merely say that the Union here did not do what extent law requires, viz. give a legitimate explanation of its photographing.

Springfield Hospital, 281 NLRB 643, 692-693 (1986). The case [*86] is clearly distinguishable. In that case, pro-union employees sought to engage other employees in conversations about the union. Based on those conversations, the union kept a list of employee sentiments about the union. The Board found the conduct nonobjectionable.[5]

Clearly, there is a difference between the Springfield conduct and the photographing conduct in the instant case. As the familiar quotation states: "one picture is worth a thousand words".[6] That is, an employee may be able to deny that his conversational words were anti-union, but the employee cannot deny what a picture graphically shows, i.e., a rejection of a pro-union leaflet. Likewise, if employees are asked in a conversation about their union sentiments, they can decline the conversational gambit, and thus no record will be made of pro or con sentiments. But if a union leaflet is given [*87] to

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[5] It does not appear that the enforcing court in *Springfield* dealt with the photographing issues involved herein. 899 F.2d 1305.

[6] *See* Bartlett's Familiar Quotations, p. 782 (16th Edition, 1993).

an employee, the employee must either accept or reject it. It is reasonable for an employee to fear that the photographing of the incident will create a graphic and permanent record of that choice. In short, a photographic record of the incident, without employee consent, can have an intimidating effect.

Similarly, asking an employee to sign an authorization card is different from the conduct involved herein. A union solicitor will necessarily explain the purpose of the solicitation. By contrast, the photographing herein was without explanation or, at best, involved an ambiguous explanation.

The result reached by my colleagues is in contrast to that reached in cases where employers have photographed employees. The Board imposes on employers (as it does on unions) the burden of justifying their photographing of protected activity.[7] Here, the only

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[7] In the cases involving employer photographing, "the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." *F. W. Woolworth*, 310 NLRB 1194 (1993).

justification was the "explanation" discussed above. As noted, that explanation was ambiguous, and [*88] it was offered to only one employee. In these circumstances, that explanation is hardly the "solid justification" required by the Board and courts. See F. W. Woolworth, supra, quoting *NLRB v. Colonial Haven*, 542 F.2d 692 201 (7th Cir. 1976).

My colleagues suggest that employer conduct should be subject to a more stringent standard because employers have direct control over terms end conditions of employment. Because of that control, employer polling of employees may be subject to a more stringent standard than union polling of employees. Similarly, because of such control, and because employers can readily assemble employees at the work place, employers cannot generally visit [*89] homes of individual employees, while unions can do so. However, these principle have nothing to do with this case. This case involves photographing of employees, not the manipulation, or threatened manipulation, of employment terms,[8] While unions may

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[8] Where the conduct involves a promise to improve wages, there may be a distinction between employer and union promises, inasmuch as the employer is the

lack direct control over employment terms, this is not to say that unions are without means of retaliation. For example, unions have the power to threaten, or engage in, physical harm. Further, if a union becomes the Section 9 representative, it has the exclusive power to represent the employees. Thus, in many ways, a union can affect employees, just as in other ways an employer can do so. The issue is whether the Union's conduct is threatening, not whether it is as threatening as an employer's conduct might be. Where a union photographs employees as they refrain from union activity, and offers no benign explanation for that conduct, I believe that employees could reasonably be concerned that a photographic record is being kept for a non-benign purpose.

[*90]

Finally, my colleagues rely on Lechmere in support of their view that the Union's conduct herein (photographing employees) was not objectionable. Clearly, Lechmere holds no such thing.

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ultimate determiner of wages. See *NLRB v. Golden Age*, 415 F.2d 26 (5th Cir. 1969) (union promise of improved wages held non-objectionable). However, that is not the issue in this case.

Lechmere does not involve the photographing of employees. Nor does it involve alleged objectionable conduct by a union. Rather, it involves whether an employer commits an unfair labor practice by ousting union agents from its property. The Court held that there was no unfair labor practice. It is at least a reach (if not a grasping at straws) to say that Lechmere supports the majority in this case.

Member Brame's Concurring Opinion

As noted above, this case involves the issue of whether the Union's photographing of employees engaged in Section 7 activity constituted objectionable conduct. I agree with Member Brame that the issue of whether photographing is objectionable should be judged by a uniform standard, irrespective of whether the photographing is by a union or an employer. Further, that standard should not be a per se standard, either for employer or union conduct. For example, the issue of legality turns on such factors as: (1) whether the photographs were taken of employees [*91] who were engaged in a Section 7 exercise (i.e., accepting or rejecting a union or employer pamphlet); (2) the context of the photographing (e.g., a union picnic which employees

voluntarily attend; see fn. 2, supra); and (3) the clarity of the explanation of the purpose of the photographing.

However, I do not pass on the broader issues raised by Member Brame. Simply put, resolution of those issues is not necessary to the disposition of this case. More particularly, we are not faced with the unfair labor practice issue of whether employer conduct under Section 8(a)(1) is to be judged under the same standards as union conduct under Section 8(b)(1)(A).[9] Finally, for the reasons set forth above, I would apply extant law to the instant objection case. Under the extant law, I have concluded, contrary to Member Brame, that the Union's conduct was objectionable.

[*92]

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[9] Without passing on this issue, I note that the language of Sec. 8(a)(1) (interferes with, restrain, or coerce) is broader than the language of Sec. 8(b)(1)(A) (restrain or coerce). I also note that the "laboratory standard" for election objection cases is not necessarily the same as the standard for unfair labor practice cases.

Based on all of the above, and on Board precedent, I would set aside the election.

Dated, Washington, D.C. July 27, 1999

Peter J. Hurtgen, Member

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Pursuant to a Stipulated Election Agreement, approved by the Regional Director for Region 28 on December 21, 1994, an election by secret ballot was conducted on February 3, 1995.[1] by an agent of the National Labor Relations Board among the employees in the unit agreed appropriate by the parties for the purpose of collective bargaining.[2] The

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[1] All dates hereinafter refer to year 1995 unless otherwise indicated. [*93]

[2] All probationary employees beginning ninety (90) consecutive calendar days after being hired by Randell and all regular employees who are assemblers,

tally of ballots served on all parties at the conclusion of the election showed the following results:

Approximate number of eligible voters	73
Void ballots	0
Votes cast for Petitioner	40
Votes cast against participating Labor Organization	32
Valid votes counted	72
Challenged ballots	25
Valid votes counted plus challenged ballot	97

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janitors, hourly maintenance, shipper and craters, stampers and shearers and warehouse persons employed by the Employer in Tucson, Arizona; excluding all supervisors, employees occupying positions of a labor relations confidential nature, salaried employers, temporary employees, employees designated as managerial trainees secretaries and office clerical employees, guards, managers, administrators and executives.

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Challenges were sufficient in number to affect the results of the elections.

The Employer filed timely objections to the election.

The Regional Director found that the challenged ballots and the Employer's objections raised substantial and material issues of fact and credibility which could best be resolved by a hearing. On February 28, the Regional Director, pursuant to Section 102.69 of the Board's Rules and Regulations, issued and caused to be served on the parties an order directing hearing and notice of hearing directing that a hearing be held before a hearing officer for the purpose of resolving the issues raised [*94] by the challenged ballots and the Employer's objections. The designated hearing officer was directed to prepare and cause to be served on the parties a report containing resolutions of credibility of the witnesses, findings of fact, and recommendations to the Board as to the disposition of the challenged ballots and the Employers objections.

Pursuant to the Regional Director's Order, a hearing was conducted in Tucson, Arizona on March 9 and 10, by me. All parties to the proceeding appeared and were afforded full opportunity to be

heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to make closing oral arguments at the hearing or to file written briefs with the hearing officer. Counsel for the Petitioner (the Union) argued only at the close of the hearing and counsel for the Employer filed a written brief after the close of the hearing.

On the entire record in this case, including my careful consideration of the arguments of counsel, a reconciliation of conflicts of testimony, whenever necessary, and based on my observation of the attitude and demeanor of the witnesses presented by each party, and an assessment of the inherent probability [*95] of their testimony, which form the basis for my credibility conclusions, I make the following findings of fact, conclusions and recommendations to the Board.

The Challenged Ballots

At the election the Board agent conducting the election challenged the ballots of the following 24 named individuals because their names did not appear on the voter eligibility list:

Manilo Baez
Manuel Gonzalez
Adalberto Gracia
Jose Conrado
Sergio Martinez
Miguel Miranda
Frank Mendoas
Jose Osuna
Adrian Perez
Edin Reynosa
Jose Roma
Agustin Ruiz
James Munoz
Donald Campbell
Manuel Siqueros
Miguel Sosa
Tomas Venegas
Gustavo Warres
Bill Lockey
Hector Mena
Adalberto Coloris
Robin Westerbur
Ramon Soqui
Jesus Wilkerson

At the hearing, the parties stipulated that the 24 named individuals were not eligible to vote in the election and that the challenges to their ballots should be sustained, and that their ballots should not be counted.

Based on the stipulation of the parties, I recommend to the Board that

Publisher's Note:

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The following are the three enumerated areas comprising the objections:

1. The Board Agent conducting the election failed to maintain control of the area where the balloting was held, by inter alia, permitting electioneering and by permitting an individual, not listed in the eligibility list to vote unchallenged, while challenging another individual who was included in said list. The failure of the Board Agent to maintain control and supervise the area where the balloting took place resulted in the unjustified presence of persons in the area. Those irregularities in the course of the election process affected its outcome.

2. Numerous acts of intimidation, including threats and implied threats by Union adherents and agents directed to eligible voters occurred prior to and during the day of the election. Such acts and threats created an atmosphere of coercion and intimidation which, reasonably, tended [*98] to interfere

with the free and uncoerced choice of the employees.

3. Other acts of interference, restraint and coercion by Union adherents and agents which affected the results of the election.

The Claimed Improprieties at the Balloting

The election was held in the Employer's cafeteria and was conducted for the Board by Board Agent Cynthia Spurlock. Each party was represented by two observers. The Union's observers were leadworkers Pepe Valenzuela and Rudy Olvera. No objection was raised by the Employer to the Union's designation and use of the two leadworkers as election observers.

The immediate voting area itself was enclosed by a blue plastic translucent curtain which contained a triangular vertical opening for access by voters to the voting place. Voters arrived in groups of from 4 to 12, and were admitted into the voting place as it could accommodate them, after they waited in line along the plastic curtain adjacent to the opening. During the polling hours, machinery running nearby created a noisy

environment. In addition, the employees waiting to vote engaged in talking and "chit chat" that was carried on in Spanish. The Board agent requested on several occasions that the observers [*99] ask the waiting voters to stop their talking. The Board agent herself also asked for the talking to stop.

There was no evidence as to the actual content of the conversations, nor that electioneering was being engaged in by anyone waiting to vote. Although one might hope that voters in an NLRB election would maintain an attitude suitable to the solemnity of a religious service, "chit chat" in the voting line that is not disruptive enough to create a distracting atmosphere, cannot serve to warrant setting aside the results of an election.

The Regional Director, in his Order of February 28, stated that the election observers had mistakenly allowed Francisco J. Ochoa, whose name did not appear on the eligibility list, to vote an unchallenged ballot. Because of the error, the Regional Director stated that the Board agent thereafter challenged the ballot of Francisco G. Ochoa. The Employer contended in its objections that this irregularity affected the outcome of the election. No evidence, however, was

presented at the hearing in support of this contention. Nor was any non-hearsay evidence presented regarding the challenge to the ballot of Francisco G. Ochoa, presumably because [*100] it was unnecessary to do so in light of the parties' stipulation with respect to the remaining 24 challenged ballots.

Johnny Vielma, one of the Employer's observers, testified that during the balloting, union observer Pepe Velazquez made a hand signal to a voter by rubbing his index finger across his forehead, then his nose and finally his chin. There was no explanation of what those cryptic gestures by Velazquez were meant to convey, if anything. Although the election was held on February 3, a wintertime date, Velazquez, might have been wiping perspiration from his face, or signaling that someone bring him a hat, a handkerchief, and a scarf. Without more, I am not prepared to speculate that Velazquez was engaged in improper electioneering when he was seen rubbing his index finger on various parts of his face. Velazquez' physiognomy is beyond my powers.

I find that the balloting was conducted with requisite decorum, and that the Employer's contention, that the election be set aside because of

irregularities at the polling place, lacks merit. I, therefore, recommend to the Board that this aspect of the Employer's objections be overruled.

The Employer also contended that the election should [*101] be set aside because of the use by the Union of leadworkers as election observers. I disagree, and will explain my rationale in the following part of this report.

2. The Claimed Acts of Intimidation, Including Threats and Implied Threats

The Employer's objections did not specifically allege that the election was interfered with by the prounion activities of the Employer's leadworkers. At the hearing, however, it became obvious that the Employer, in presenting its evidence, was attempting to establish that the leadworkers possessed supervisory authority and engaged openly in prounion activities, including wearing hats and shirts containing the union logo and wearing "Vote Yes" tags. Additionally, leadworkers Pepe Velazquez and Rudy Olvera acted for the Union as observers at the election. In its posthearing brief, the Employer expounds a full blown argument that the evidence established that the leadworkers were

either supervisors within the meaning of Section 2(11) of the Act or managerial employees under Board and court decisions. Although not stated in its brief, it almost appears that the Employer is attempting to make a postelection challenge to the eligibility of the leadworkers. [*102] Of course, the Board will not permit challenges in the guise of "objections" after the election. *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946); NLRB Field Manual 11360.

The leadworkers appeared on the eligibility list prepared by the Employer and apparently voted without challenge. There is no evidence of any claim that they were not included in the agreed to unit as a result of any preagreement discussion. Vicky Rynda, the Employer's office manager and human resources assistant, testified that leadworkers were placed on the eligibility list by the Employer. She testified that leadworkers began wearing union hats a month or two before the election and continued wearing them openly and without hindrance at least up to the date of election. The Employer put out no instructions prohibiting the wearing of union apparel by leadworkers, and leadworkers were given no instructions by the Employer concerning refraining from engaging in activities on behalf of the

Union. Rynda attended the preelection conference at which the parties designated their observers. She testified that the Employer registered no objections to the Union's selection of leadworkers Valenzuela [*103] and Olvera as its election observers.

At the hearing, the Employer presented evidence of job duties and responsibilities exercised by leadworkers that pointed toward a prima facie showing of supervisory status. In the setting of this procedure I am not prepared to recommend that the Board find that the leadworkers are supervisors within the meaning of the Act or managerial employees.[3] Their status as participants in the election seems to have been agreed to by both parties, at least by the time the election agreement was executed and approved. The Employer's belated contorted assertions amount to nothing more than a post-hoe bootstrap contention that I reject and recommend that the Board reject.

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[3] It seems to me that by no stretch, even if relevant, could *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), be applied to the leadworkers in this case.

It has been consistently and long held by both the Board and the courts, that, where established supervisors are also part of the bargaining unit,[*104] affirmative participation by an employer in the activity involving the union must be found to support a claim of coercion.

When an established supervisor is included in the unit by agreement of a union and an employer and is permitted to vote in an election, the employees obviously regard him/her as one of themselves. Statements made by such a supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus, they do not tend to intimidate employees. *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956); *Hy Plains Dressed Beef, Inc.*, 146 NLRB 1253, 1254, (1964); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 889 (2d Cir. 1977).

The Employer here is trying to make leadworkers unwitting agents of its own power and authority in order to take advantage of a situation that it allowed to develop without constraint. Simple elemental fairness cannot allow such a result. I, therefore, recommend that this portion of the Employer's objections be overruled.

The Alleged Threats

Employee Carlos Velazquez testified that about a week before the election, he [*105] wore a blue tag on his clothing on which the phrase "Randall, Vote No" appeared. Two fellow employees, who displayed prounion emblems on their persons, told Velazquez to take off the Vote No tag. One of the two, Jesus Gallegos, told Velazquez that Velazquez was looking for problems. The other, Guillermo Celaya, only told him to take off the tag. Velazquez responded that he had a right to wear the badge if he wanted to.

Velazquez testified that on the same day, after work, as he was driving home, he was chased by Gallegos and Celaya who were driving two separate vehicles, Velazquez testified to a harassing ride in which Gallegos and Celaya harassed him by boxing him in, speeding, the slowing, and attempting to force him off the road.

Gallegos and Celaya both credibly denied the account of the incident as testified to by Velazquez. Gallegos testified that he had not been involved in any incident with vehicles that involved Velazquez. Celaya testified to a minor situation where it was Velazquez who cut suddenly into a lane of traffic

in which Celaya was approaching, which caused Celaya to slam on his brakes to avoid hitting Velazquez' car. Two other credible witnesses, Luis LaMadrid and [*106] Edwardo Lopez, corroborated Celaya's account of his involvement with Velazquez and a driving incident.

Nevertheless, a rumor circulated throughout the plant that Carlos Velazquez had been almost forced off the road while driving home from work. After hearing about the incident, Velazquez' leadman, Pepe Valenzuela, told Velazquez "You have to be careful, you don't know what they are doing, they are crazy."

The Employer conducted a series of meetings of small groups of employees before the election. At these meetings, which were conducted by consultants employed by the Employer, the Employer's position on the election and unions was presented. A videotape about union strikes was shown at the meetings. The video showed the negative aspects of having a union at the Employer. Employee Ray Encinas, who outwardly supported the Union, attended two of these meetings. Both Plant Manager John Halifax and Gerardo Martinez attended the meetings at which Encinas was present. At one of the meetings an employee questioned what would happen if there was a strike and

some employees crossed the picket line. According to the testimony of Manager Gerardo Martinez, Encinas responded "that they would bring [*107] somebody from down below to take care of those people." Neither the consultants nor the employer managers made any reply to Encinas' comment and the meeting ended.

At the second meeting that Encinas attended an employee asked what would happen to those people who did not want to become members if the Union was voted in. Manager Martinez testified that Encinas said that "they would have the Chico Mafia take care of those people" Again, neither the consultants nor the employer managers made any reply to Encinas' comments, and the transcript is silent with respect to whether there was any laughter generated by Encinas' comment.

Finally, employee Johnny Vielma testified that he was wearing a "Vote No" tag on his shirt and leadworker Pepe Valenzuela, pointing to the tag, said that "there is people here that beat up people that wear that."

None of the individuals who were alleged to have engaged in unlawful threats and other misconduct affecting the results of the election were shown to

have been union officers, representatives, or agents. In fact, the Employer attempted to show that leadworkers were its own agents, either as supervisors or managerial employees. Viewing the activities of [*108] those individuals, there is no evidence that their status was other than that of strong union adherents, at most. It is not uncommon for strong feeling to be generated during a union organizational campaign and for employees to line up in prounion and anti-union groups. The creation of such groups does not a fortiori lead to the conclusion that the activities of such groups are attributable to either party. As here where the conduct complained of is not instigated, authorized, solicited, ratified condoned, or adopted by the Union, the Union cannot be held accountable for such conduct. The *Gabriel Co.*, 137 NLRB 1252, 1267 (1962); *Bronze Alloys Co.*, 120 NLRB 682 (1958).

In determining whether to set aside an election based on the activities of persons other than the parties, the Board accords less weight to such conduct than to conduct of the parties. The Board believes that the conduct of third persons and rank-and-file employees tends to have less effect on the voters than similar conduct attributable to the

Employer who has, or the Union which seeks, control over the employees' working conditions. *Orleons Mfg Co.*, 120 NLRB 630 (1958). [*109] The conduct, however, of rank-and-file union adherents is not completely immunized from restraint and the Board has held that conduct that creates such confusion and fear of reprisal, as to interfere with a free and untrammeled choice of representatives in an election, will form the basis for setting the election aside. *Poinsett Lumber & Mfg. Co.*, 116 NLRB 1732 (1956).

Although threats of retaliation or physical violence whether expressly stated or indirectly inferable are not to be condoned, the Board will not attempt to police the unrestrained activities which sometimes regrettably appear in heated union elections. I do not view the remarks of the employees outlined above as serious enough to form the basis for setting aside the election. Nor do I find that an atmosphere of confusion of fear was created in which a free and fair election could not have been held. I, therefore, recommend that this portion of the Employer's objections be overruled by the Board.

Photographing Employees

The parties stipulated that prior to the election, union representatives took photographic pictures of union representatives distributing union literature outside of the [*110] Employer's plant. Several employees testified, that a person with a camera aimed the camera at their persons or their vehicles when they were exiting the Employer's property while other individuals were distributing union flyers. There is no evidence that the Union ever communicated to employees the reason for the use of a photographic camera at those times. Employee Carlos Velazquez testified that he asked one of the individuals distributing flyers why the other person was taking pictures. Velazquez testified that he was told:

It's for the Union purpose, showing transactions that are taking place. The Union could see us handling flyers and how the Union is being run.

This is not so clear explanation is hardly enough to comfort someone that the photographs might not be used for some other, possibly devious, purpose.

The Board has held that, in the absence of a valid explanation,

photographing employees by a union, amounts to objectionable conduct. *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989). The Board has also found that the unexplained video-taping of employees as they exited the employer's plant and were handed union leaflets warranted the [*111] setting aside of an election and directing a new one. *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB 736 (1988). The Board found in Pepsi-Cola:

> Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election.

Based on the above, I recommend that the Employer's objection based on the photographing of employees be sustained, that the election held on February 3 be set aside, and that a new election be directed by the Board.

Filing of Exceptions

Within 14 days from the date of issuance of this report, either party may file an original and seven copies of exceptions thereto with the Board in

Washington, D.C. Immediately on the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director and the hearing officer. If no such exceptions are filed, the Board will adopt the recommendations of the hearing officer.

Dated, Albuquerque, New [*112] Mexico April 5, 1995

QUALITY HOUSE OF	)
GRAPHICS, INC. and	)Case Nos.
LOCAL ONE-L,	)29-CA-21820,
GRAPHIC COMMUNICATIONS	)29-CA-21963
INTERNATIONAL UNION	)29-CA-22041

NATIONAL LABOR RELATIONS BOARD

1999 NLRB LEXIS 521

July 22, 1999

COUNSEL:
[*1] Stephanie La Tour, Esq. for the General Counsel.

Allen B. Roberts, Esq. & Gregory B. Reilly, Esq. (Roberts & Finger, LLP) for the Respondent.

Thomas M. Kennedy Esq. & Ira Cure, Esq. (Kennedy, Schwartz & Cure, P.C.) for the Union.

ALJ: JESSE KLEIMAN

ALJ-DECISION:

[EDITOR'S NOTE: THE ORIGINAL SLIP OPINION CONTAINED ILLEGIBLE WORDS AND/OR MISSING TEXT. THE LEXIS SERVICE WILL PLACE THE CORRECTED VERSION ON-LINE UPON RECEIPT.]

DECISION

Statement of the Case

JESSE KLEIMAN, Administrative Law Judge: Upon the basis of charges in Case Nos. 29-CA-21820, 29-CA-21963 and 29-CA-22041, filed by Local One-L, Graphic Communications International Union, herein called the Union or Charging Party, on March 11, 1998, April 29, 1998 and May 26, 1998, respectively, against Quality House of Graphics, Inc., herein called the Respondent, a second consolidated amended complaint and notice of hearing was issued on July 29,1998, alleging that the Respondent has been failing and refusing to bargain collectively with the Union as the representative of the Respondent's employees in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein referred to as the Act. By answer timely filed, [*2] the Respondent denied the material allegations in the second consolidated amended complaint, and raised various defenses.

A hearing was held before me in Brooklyn, New York, from November 16 to November 18, 1998. Subsequent to the closing of the hearing the General Counsel, the Charging Party and the

Respondent filed briefs. In her brief Counsel for the General Counsel moves for amendments to the transcript involving mostly spelling and other seemingly inadvertent mistakes in wording, none of which appears to alter the record evidence in any meaningful way. I therefore grant the motion since there also seems to be no opposition thereto from the other parties.

On the entire record and the briefs of the parties and on my observation of the witnesses, I make the following:

I. FINDINGS OF FACT

1. The Business of the Respondent

The Respondent, a New York corporation, with its principal office and place of business located at 47-47 Van Dam Street, Long Island City, New York, herein called the Long Island City facility, is engaged in the pre-press preparation and production of printed materials. During the past year, the Respondent, in the course and conduct of its business operation, purchased [*3] and received at its Long Island City facility, printing supplies and other products, goods and materials valued in excess of $50,000 directly from points outside the State of New York. The second

amended complaint alleges and I find that the Respondent is now, and has been at all material times herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The second consolidated amended complaint alleges, the evidence in the record establishes and I find that the Union at all material times herein, has been a labor organization within the meaning of Section 2(5) of the Act.

1. The Alleged Unfair Labor Practices

The second consolidated amended complaint alleges that the Respondent failed and refused to bargain in good faith with the collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act; by insisting to impasse on a non-mandatory subject of bargaining as a condition precedent to reaching final agreement on a successor collective-bargaining agreement; by unilaterally implementing its final offer notwithstanding that it could not lawfully insist to impasse [*4] over the non-mandatory subject of bargaining; by unilaterally ceasing to deduct and remit

employees, dues payments to the Union without affording the Union an opportunity to bargain concerning the cessation of dues checkoff; and after being informed by Region 29 that it intended to issue a complaint, making regressive and retaliatory bargaining proposals.

A. The Evidence

Background

For many years, Local 1-P, Graphic Communications International union (herein called Local 1-P) had been recognized by the Respondent as the exclusive collective-bargaining representative of its employees, with such recognition embodied in successive collective-bargaining agreements the most recent of which was effective by their terms for a period from February 1, 1995 to January 31, 1998. These agreements, the Photo-Engravers Agreement and the Photo-Industrial Agreement, both contain a provision for a 30-day renewal after January 31, 1998 pending further negotiations. In or about October 1997, Local 1-P and Local One-L merged whereupon the employees were then represented by Local One-L, GCIU the Charging Party herein.

Both the Photo-Engravers and Photo-Industrial agreements contained union [*5] security clauses requiring employees to become "members" or "members in good standing."[1] The Photo-

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[1] It is well established that the only "membership" a contract may require as a condition of employment is so-called "financial core" membership, limited to the payment of periodic dues and initiation fees, *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), as opposed to full union membership. The Beck case further established that unions may require agency-fee payers to pay only such representational costs as collective bargaining and contract administration. *Communications Workers v. Beck*, 487 U.S. 735 (1988). The United States Supreme Court has recently confirmed the facial validity of contract language requiring union "membership" as a condition of employment, holding that a union does not breach its duty of fair representation by negotiating a contract with "membership" language without also expressly explaining, in the contract, the limited meaning of such "membership" under the General Motors and Beck cases. *Marquez v. Screen Actors Guild*, 119 S.Ct. 292 (1998). Thus, the union security language in the two contracts involved herein is facially

(continued...)

Industrial agreement also includes a dues check-off requiring the Respondent to deduct payments from the employee's wages (when properly authorized) and to remit these payments to the Union. Robert Mitchell, vice president of the Union testified that the parties have a separate dues check-off agreement for the Photo-Engravers' unit.

[*6]

The units appropriate for the purposes of collective-bargaining as set forth in these agreements are as follows:

Article 3, Section 1 of the Photo-Engravers' Agreement provides:

Section 1. All employees (including foremen) engaged to do the work which comes under the jurisdiction of the Graphic Communications International Union, shall without limitation, be covered by the terms of this contract; all work, processes, operations and products directly or indirectly in whole

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(...continued)
valid. Furthermore, although the Union's security practices are not an issue in this case, it should be noted that GCIU gives agency-fee payers annual notice of their rights under Beck.

or in part, incident to, associated with or related to Lithography, offset (including dry or wet), Photo-engraving, Intaglio, Gravure, including without limitation any technological or other change, evolution of or substitution for any work, process, operation or product now or hereinafter utilized in any of the methods or for any of the purposes described above.[2]

Article 4, Section 4.1 of the Photo-Industrial Agreement includes:

All employees, excluding salesmen, journeymen and apprentices.[3]

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[2] The Photo-Engraver employees (craft classifications) perform the actual color separation, the press work, and operations pertaining to the production of the work product. "At the time of the impasse . . . [there were] approximately 85 employees in this unit, (herein called Unit A)." [*7]

[3] The Photo-Industrial employees (support unit), log in and catalog work, perform work other than crafts production and are also "shipping and maintenance people." At the time of the "impasse" there were approximately 50 employees in this unit.

Depending upon their respective bargaining unit, the Respondent's employees are covered by three pension plans. The Supplemental Disability and Retirement Fund ("SRDF"), the New York Commercial Photo-Engraver's Employer and Employee Retirement Fund ("E&E"), and the Inter-Local Pension Fund. The SRDF requires the Respondent to contribute 7% of the employees wages to the Graphic Communications International Union, AFL-CIO, herein called, GCIU, under both the Photo-Engraver and Photo-Industrial contracts. The E&E requires the Respondent to contribute $17.00 per week to this fund on behalf of employees in the Photo-Engravers unit only and did not apply to employees in the Photo-Industrial unit. The SRDF and the E&E Funds are employer-funded, "jointly trusted" trust funds. They have an equal number of trustees from the union and employers within the industry,[*8] and are governed by collective-bargaining agreements and various trust documents.

The Inter-Local Pension Fund, is distinct from the other two pension funds. Employers do not make any contributions to the Inter-Local fund. Rather, it is union members who contribute to this fund, as a condition of their union membership as required by he Union's by-laws. The Inter-Local trust

fund does not have any employer-trustees, but consists only of union trustees from various GCIU locals. Moreover, unlike the two other pension funds described above, the Inter-Local fund is not a so-called Taft-Hartley fund. Additionally, the Inter-Local fund is not governed by any collective bargaining agreements but is governed by the Union's constitution, by-laws, a trust indenture, and such federal laws as ERISA and Section 501(c)(18) of the Internal Revenue Code. The amount which members must contribute to the Inter-Local fund is determined by the members themselves, under the Union's internal procedures,[4] and not by any

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[4] Specifically, Robert Mitchell vice-president of Local One-L testified that each local or unit determines its own contribution rate. The Trust Indenture specifies a minimum of at least $2.50 per week, but members of a participating local may vote to increase their unit's contribution rate and Trust Indenture. Once the rate has been chosen by members in the local or other sub-group, all members in that group are required to pay the same rate; individual members cannot choose to contribute more or less than the officially-determined rate. In early 1998, members of Local One-L voted to amend the local's by-laws by increasing their

(continued...)

collective bargaining with employers. Union members who work at Quality House of Graphics in the Photo-Engravers' unit pay $2.50 per week to the Inter-Local fund. Union members who [*9] work at Quality in the Photo-Industrial unit pay 2% of gross wages to the Inter-Local fund. These contribution rates were established under internal union procedures, specifically by a vote of members of the former Local One-P, and not established through collective bargaining with the Respondent. In fact, members, specific contribution rates to the Inter-Local fund are not even mentioned in the 1995-98 collective bargaining agreements.[5] Essentially, the

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(...continued)
contributions rate to 6% of gross wages; however, units that previously belonged to Local One-P before the union merger - such as members at Quality - were expressly exempted from that increase. [*10]

[5] The Photo-Engravers' contract does not mention the Inter-Local fund at all. The Photo-Industrial contract includes at Article 17 a checkoff-type provision, requiring the Respondent to deduct and remit properly-authorized contributions to the Inter-Local fund (formerly known under a different name),

(continued...)

Respondent has had no involvement whatsoever in the Inter-Local fund, except that members, contributions can be deducted from their pay and remitted to the Union under a check-off mechanism.[6]

It should be noted that the Respondent's employees are not required to participate in the Inter-Local fund as a condition of employment. Rather, participation in this fund is required only as a condition of full union membership. So-called "financial core" members are not required to participate and, in fact, Local One-L has financial core members at other shops who do not participate in the Inter-Local fund. Thus, although the 1995-98 [*11] contracts require employees to become "members" (see footnote 1, supra), these provisions could not and do not require

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(...continued)
but it does not specify the contribution rate. Article 17 states that "at least $2.50 per week" will be withheld from members, wages, whereas the actual rate for the Photo-Industrial unit is 2% of gross wages.

[6] Dues payments remitted by the Respondent go into the Union's general fund, whereas Inter-Local contributions go to the Inter-Local trust fund itself.

all employees to become full union members and to participate in the Inter-Local fund. However, it appears that all Quality employees in both bargaining units are full union members, and therefore they all participate in the Inter-Local fund.

The Negotiations

In view of the January 1, 1998, expiration date of the Photo-Engravers and Photo-Industrial Agreements, in November of 1997 the Union contacted the Respondent regarding the commencement of negotiations for new collective bargaining agreements. Thereafter negotiation meetings between the parties were held from January to March, 1998.[7] The parties first negotiation meeting occurred on January 31, 1998 at the Respondent's premises. With the addition of one or two new representatives of the parties, at various times during

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[7] Much of the following is based upon the testimony of Robert Mitchell, the Union's vice-president and the exhibits in the record. However, during his testimony, Mitchell admitted that he did not remember the exact chronology of each of the eight bargaining sessions from January to March, 1998, i.e. more than eight months before the hearing.

subsequent negotiation meetings, the Union's and the Respondent's negotiating committee members remained the same. At this meeting the Respondent was represented by John Aslanian, owner, Nubar Nukashian, executive vice-president, Douglas Schara, chief financial officer and [*12] Lori Montgomery treasurer (and a principal of the Respondent). The Union was represented by Stanley Aslanian (no relation to John Aslanian), the Union's president emeritus, Patrick LoPresti, the Union's president, Robert Mitchell, the Union's vice-president, and Louis Martino, shop delegate.

The Union presented a set of written proposals which included a "substantial" wage increase, increased contribution by the Respondent to the Union's Welfare Fund and the SRDF pension fund; upgrading the "desktop" employees (previously under the Photo-Industrial contract) by including them in the Photo Engravers contract; two additional paid holidays; allowing employees to get the maximum paid [*13] vacation after one year of employment; a seniority, layoff provision; and an increased night-shift differential. The Union explained its proposals and their importance but rather than considering the Union's specific proposals, the Respondent's

representatives instead persisted in discussing the merger between Local 1-P and Local One-L and whether this merger would affect the negotiations and any resulting collective-bargaining agreement, and whether it would increase the chance of a strike. Moreover, while there had been no mention of the Inter-Local Pension Fund in the Union's initial proposals, the Respondent also expressed concern that the employee's contribution to the Inter-Local fund might be increased. However, Mitchell testified that the Union explained that the contribution rate for the Photo-Engravers and Photo-Industrial units of Local 1-P members could not be increased unless the members themselves voted to increase it.[8] The union also explained that the contributions rate was a matter between the Union and its members, and had nothing to do with the Respondent or the merger.

[*14]

The next negotiation session was held at the Respondent's premises on February 5, 1998. Chuck Appelian and

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[8] The Photo-Engravers and Photo-Industrial units, each paid a different contribution rate to the Inter-Local Pension Fund as indicated hereinbefore.

possibly Tom Mustapich, both salesmen joined the Respondent's negotiating team as did the Respondent's attorney, Allen Roberts. Esq. After a discussion regarding the presence of Roberts, at the meeting, and the Respondents' assurance that it would not be detrimental to the negotiations, the Respondent requested some additional information concerning the benefit funds and a copy of the Union's constitution and by-laws. Previously the Union had already provided some information to the Respondent, such as the funds' IRS Form 5500. At this meeting the Respondent questioned the financial status of the Union's Health and Welfare Fund and the E&E pension fund and the benefits that the funds dispersed. While Mitchell defended the financial stability of the Welfare Fund, with regard to the E & E Pension Fund he explained to the Respondent's representatives that this fund had three retirees for every active member, and it had been difficult to provide a larger benefit to participants in the fund because of the ratio of pensioners to active members.[9] There was no resolution

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[9] Mitchell acknowledged that the Union was aware of general dissatisfaction by some of the union members regarding the pension fund's "bad treatment" of them

(continued...)

at this [*15] meeting of the pension issues and the Respondent neither presented any contract proposals nor responded to the Union's proposals. In fact, this meeting was almost entirely taken up with the Respondent's questions regarding the pension funds.

The third meeting occurred on February 10, 1998. In addition to the above mentioned Union representatives, two of the Union's attorney's, Ira Cure, Esq. and Lauren Esposito, Esq. also attended. Salesmen Chuck Appelian and Tom Mustapich additionally joined the Respondent's negotiating committee. The union requested contract proposals from the Respondent which as yet had not been forthcoming. Instead, the Respondent continued to request information from the Union. In response the Union agreed to provide the Respondent with a copy of the galley proofs [*16] of its by-laws in this form, since the by-laws had been amended in November 1997, and were in the process of being printed in final form. However, the Union advised the Respondent unequivocally that the Union's by-laws

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(...continued)
under the former ALA Local 1 which subsequently became known as Local 1-L.

were not any of the Respondent's business, and that the Union would not bargain over them.

After the parties discussed other requested information, the Respondent then presented its proposals, verbally and in writing. The Respondent's proposals included a general wage increase (unspecified), a merit-raise "pool", voluntary flex-time, and a different health plan to be chosen by the Respondent. The Respondent also proposed significant changes in the pension plans, eliminating the Respondent's requirement to contribute to the SRDF and E&E funds, and eliminating Union members, requirement to contribute to the Inter-Local Fund. Mitchell testified that John Aslanian explained that the Respondent wanted employees to be able to put their contributions in a 401(k) plan for a substantial return on their money.[10] The

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[10] The Respondent's pension funds proposals were:

> 6(a) utilizing the contribution currently being made to the Supplemental Retirement and Disability Fund (7% of scale) to Quality employees in the form of a salary increase; (b) Utilizing

(continued...)

Union rejected the Respondent's pension proposals, which essentially would eliminate the existing pension funds. Mitchell stated that he defended the value of the [*17] Union's maintaining the SRDF and E&E Funds, and as for the Inter-Local Fund the Union explained that the Respondent's proposals 6(c) regarding this fund would violate the Union's by-laws and the Inter-Local Fund trust indenture, and that besides, the Inter-Local Fund was an internal matter between the Union and its members, and did not involve the Respondent. However, none of the pension issues were resolved at the February 10, 1998 meeting.

The fourth meeting was held on February 17, 1998. The attorneys representing the Union were [*18] now Thomas Kennedy, Esq. and Ira Cure, Esq. At this meeting the parties made additional requests for information and the Union provided the Respondent with

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(...continued)

> the contribution currently being made to the "Employers and Employees Fund" (up to $17/week) to Quality employees in the form of a salary increase; (c) Making the 2% involuntary contribution to the "Inter-Local Pension Fund" a voluntary contribution.

galley proofs of its by-laws and a copy of its constitution reiterating that these were not a subject of bargaining. While the Respondent also provided some information that the Union had requested, Mitchell testified that the union complained to the Respondent that the parties had not really been bargaining and the information sought by the Respondent could have been obtained upon request much earlier. The union also complained that the Respondent had not made a specific wage proposal as yet. During the negotiation session the Union withdrew its proposal for additional holidays and offered a wage proposal for a 5 percent wage increase. The Respondent amended its health benefit proposal to permit input by the Union regarding the choice of health insurance, withdrew its flex-time proposal, and the parties discussed the Union's vacation proposal. According to Mitchell the Respondent explained that it wanted to make pension contributions to the funds "voluntary" so that employees could choose whether to contribute to the existing funds, [*19] to a 401(k) plan, or to accept the contributions as a wage increase.

However, the Union explained that with regard to these pension funds the SRDF could accept contributions only from employees under valid GCIU collective-

bargaining agreements,[11] that the SRDF's rules did not allow individual employees to make contributions, and that the local union was not in a position to bargain over the rules of this International Trust Fund in Washington, D.C. The Union also reiterated that as concerns the Inter-Local Fund, union members, contributions are set by a vote of the entire local; that there is no provision for individual choice in that sense; and that full membership in the Union requires a contribution to this fund. The Union also again made it clear that besides, this was solely between the Union and its members, and that the Union did not intend to bargain over its constitution and by-laws. Nevertheless, the Union agreed to consider bargaining over the E&E Fund, since it was a local fund over which the parties could exercise some control by virtue of having three of its four trustees.[12] Mitchell testified that he believed that while the

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[11] This was later confirmed by the SRDF Administrator.

[12] The Employers and Employees Fund is located in New York and of the four trustees, two trustees (Stanley Aslanian and Robert Mitchell) were from Local One-L, and one trustee (Joan Botty), was from Quality House of Graphics, Inc.

Union wanted to talk about wage proposals, [*20] it was at this meeting that Chuck Appelian stated that wages would not be a "problem" but that pensions were the "logjam" issue. He also stated that most of this meeting was again taken up with a discussion of the pension issues as in the previous meetings.

The fifth negotiation session took place on February 24, 1998 at the Respondent's premises. It was at this meeting that the Respondent made its first wage proposal. Again the pension issues were discussed with the parties exploring the possible annuitization of the E&E Fund. The Union again reiterated. that the SRDF fund could not be changed and that the Inter-Local Fund was strictly between the Union and its members, and was not an appropriate subject for bargaining. The Respondent's [*21] witness Douglas Schara, confirmed that Union president Emeritus. Stanley Aslanian, had warned the Respondent that it would require a change in the rules and regulations of the funds to permit voluntary contributions. Mitchell testified that the pension issue was a "hard-nut issue" and was considered all through the negotiations. Moreover, Mitchell also testified that this may have been the meeting (if not February

26) wherein John Aslanian the Employer's principal, first announced that "We're at impasse over these pensions".[13] The parties continued their discussion of the health insurance fund with the Respondent insisting that all contributions be used for the benefit of the Respondent's employees only. The meeting ended without any resolution of the pension issues.

The sixth negotiation session occurred on February 26, 1998. The Respondent distributed a written modification of [*22] its health-benefit proposal which the parties discussed. Mitchell testified that there was an extensive discussion of the wage issue with the Union seeking a percentage increase and the Respondent wanting to discuss a flat dollar increase. Mitchell recalled that Chuck Appelian again, as on a number of prior occasions, stated that "Wages are not the real issue here", and John Aslanian perhaps at this meeting said, "we were at impasse over the pensions."

Mitchell testified that the Respondent wanted employees to have

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[13] Schara's notes of the negotiations on February 24, 1998, although rhetorically, states "Can negotiations break down because of this?"

choices regarding their contributions including a 401(k) plan and complained that the pension plans as constituted were too restrictive on the employer. The Union's attorney Kennedy proposed that the Union might possibly consider the annuitization of the E&E Fund, but that the Union had no control over the SRDF, and that the Inter-Local Fund was an internal Union matter. Mitchell testified" . . . the Inter-Local Fund is . . . a part of our by-laws. It is a union fund run by the union contributions by union members, and we are not going to negotiate. That was not any business of the company". The Union's attorney Kennedy, at one point during the meeting, again offered that the [*23] Union would consider the possible annuitization of the E&E Fund if the Respondent would withdraw its proposals regarding the SRDF and Inter-Local Funds (proposals 6(a) and 6 (c) respectively). The Respondent refused and the meeting ended with no resolution of the pension issues.

The seventh negotiation meeting was held on March 3, 1998 at the Union's office. Mitchell testified that some progress was made on certain issues, including the Respondent's withdrawal of its health-benefit proposal and the Union's withdrawal of its night-shift differential proposal. The parties also

appeared to agree on the vacation issue. However, the Respondent remained adamant on its position regarding the pension issues which remained unresolved between the parties. Mitchell related that Chuck Appelian made a long speech, stating that the employees should have a choice as to whether they wished to contribute to the Inter-Local Fund. Then the Union's attorney Kennedy and Stanley Aslanian, both pointed out that the Respondent was seeking a change in the Union's by-laws, and that the Union would not negotiate its by-laws with the Respondent. The Respondent also amended its proposal regarding the Inter-Local [*24] Fund 6(c) to provide that any contribution to this fund be voluntary and that any increase in the amount be subject to "each individuals, consent." At some point during this meeting the Union agreed to allow the photo-engravers to choose to put the former E&E Fund contributions ($17 per week) into a 401(k) plan, if the other pension proposals by the Respondent were taken off the table. After a "sidebar" (or off the record) meeting between Stanley Aslanian for the Union, and John Aslanian and Nubar Nakashian for the Respondent, failed to resolve the pension issues, the meeting ended.

The eighth and final negotiation session took place on March 9, 1998 at

the Union's office. Mitchell testified that the Union made a "comprehensive" proposal that included a $35 wage increase for the Photo-Engravers, a $20 wage increase for the Photo-Industrial employees; the inclusion of the desk-top employees into the Photo-Engravers unit; and proposals regarding personal days and vacation time. Moreover, the Union proposed to annuitize the E&E Fund if the Respondent would withdraw its proposal affecting the SRDF 6 (a) and Inter-Local Funds 6 (c) in its bargaining offer. Mitchell stated that some of [*25] the above issues were resolved by the parties including the outstanding Health and Welfare issues, but the Respondent still refused to withdraw its proposals regarding the SRDF and Inter-Local Funds, However, Mitchell related that the Union felt that if the pension issues, "the crux of the negotiations," could be resolved, the parties could agree on successor collective bargaining agreements.

The Respondent's offer to the Union encompassed a wage increase of $20 per week for photo-engraver employees, a $15 per week increase for photo-industrial employees, and a $20 wage increase for desktop workers. The Respondent also offered to extend the more generous photo-industrial vacation policy to the

photo-engraver employee, and give desktop employees covered by the Photo-Industrial collective-bargaining agreement five personal days as enjoyed by the photo-engraver employees. However, the Respondent's position regarding its proposals affecting the pension issues remained the same, namely, that employee contributions to the SRDF would be on a voluntary basis, with employees in both the Photo-Engraver and Photo-Industrial units having a choice as to whether they wished to continue contributions to the SRDF fund, opt for a 401(k) plan, or have the amount added to their pay, and [*26] to "make the 2% involuntary contribution to the 'Inter-Local Pension Fund' a voluntary contribution."

Mitchell testified that at one point during this meeting either Chuck Appelian or Allen Roberts asked whether the Union felt that the parties had "come to a wall on the pensions and at these negotiations", and the Union's attorney, Ira Cure, responded, "Well, we are not drawing any lines in the sand," but that the Union could go no further on the pension issue. Cure repeated that the Respondent would have to withdraw its proposals 6(a) and 6 (c) which were unacceptable to the Union, again explaining that the SRDF and Inter-Local funds could not be made voluntary as

proposed by the Respondent, and that contributions to the Inter-Local Fund were mandated by the Union's by-laws and therefore were an internal Union matter, and as such, none of the Respondent's business.

Mitchell testified that the Union representatives then caucused and upon their return were told by the Respondent's representative Chuck Appelian that he felt that "we had gone as far as we could and that the Company was now going to implement its final offer." In addition to the wage increases, additional personal days, [*27] and more generous vacation policy set forth in its above final offer, the Respondent also stated that it would make all contributions to the pension funds voluntary and would no longer make the required contributions to the SRDF and E&E funds. Instead the employees would have a choice of continuing to contribute to these funds, or to receive the amount of the contributions, if not accepted by the SRDF[14] or the E&E funds as additional

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[14] The Respondent advised the Union that it would implement its proposal regarding the SRDF contributions on March 1, 1998 and if the SRDF did not accept the contribution, the Respondent would add

(continued...)

pay, or to place these amounts for the employees in a 401(k) plan.

The Respondent also announced that it would no longer deduct and remit employees' Inter-Local Fund contributions to the Union. Upon hearing this, the Union representatives got up and left the room ending the negotiation session. As Mitchell testified, "Not that we had resolved all the issues, but from our side of the table, we felt we were close enough on the other issues that could we get these pensions resolved, we could possibly get a contract."

[*28]

It should be noted that, during all of the negotiating sessions (January to March 9, 1998), the Respondent never proposed eliminating the contract's provisions for union security and dues check-off, nor had this issue ever arisen

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(...continued)
that amount to the employees pay. Since under federal law the SRDF can accept contributions only from employees under a GCIU collective-bargaining agreement, the SRDF was forced to return individual employee's contributions who chose to continue their contributions to the SRDF fund.

in the discussions between the parties. However, after the parties' contracts had expired, including the 30-day extension, the Respondent ceased deducting and remitting employees' dues payments to the Union. It also should be noted that there was no evidence in the record that any employee had revoked his dues checkoff authorization. Moreover, the cessession of dues deductions and remittance to the Union was not part of the Respondent's final offer.

What Occurred After March 9, 1998

By memorandum dated March 11, 1998 from Douglas Schara, the Respondent notified all its bargaining unit employees of the terms of its final offer that would be implemented following the expiration of the collective-bargaining agreements and of the "impasse" in negotiations on March 9, 1998.[15] The

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[15] This case is interesting in that all parties acknowledge the existence of an "impasse" reached on March 9, 1998. However, the General Counsel contends that the Respondent unlawfully bargained to impasse on a non-mandatory subject of bargaining as a condition precedent to reaching a final agreement, the Union (continued...)

employees were also given forms on which to choose the method of distributing their pension contributions. The Respondent then implemented its final offer thereafter as of [*29] March 1, 1998, discontinuing the 7% contributions to the SRDF required to be made for both bargaining unit employees and allowing employees to choose whether to continue such contributions in the SRDF or an equivalent 401(k) option or a pay increase; discontinuing the $17 per week contribution to the E&E fund on behalf of employees in the Photo-Engraver's unit and giving the money instead to employees as a wage increase; and discontinuing deducting and remitting the 2% Union member's contribution to the Inter-Local Fund. The Respondent also notified employees in both bargaining units that it would no longer automatically deduct dues from the employees paychecks and

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(...continued)
supporting and agreeing with the General Counsel's position herein. Contrary to this the Respondent instead maintains that a lawful impasse was reached on a mandatory subject of bargaining and therefore no violation occurred when the parties bargained to impasse on March 9. [*30]

remit dues payments to the Union.[16]

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[16] The "Dues Check-off" provision in the Photo-Industrial Agreement between the parties provides:

> Article 6 6.1 The Company agrees that upon receipt of written authorization, the Company will deduct Union dues monthly in the amount specified in said authorization, and transmit same to the Union.
>
> 6.2 Such authorization shall not be revocable for a period of one year or until the termination date of this contract or renewal thereof, whichever is earlier, and the revocation shall not be effective until ten (10) days after written notice thereof has been given to the Company.

This language also appears in a "Dues Check-off Agreement" dated January 18, 1988 between the Respondent and Local 1-P G.C.I.U. The checkoff authorization card admitted into evidence as representative of the current card in use by the Union was as follows:

(continued...)

(...continued)

TO BE SIGNED AND DELIVERED TO COMPANY BOOKKEEPER

CHECKOFF AUTHORIZATION

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA

TO: Quality House of Graphics

Name of Company

DATE: January 20, 1998

I hereby authorized you to deduct union monthly dues from my wages paid on the first day in each month, and to make weekly deductions of Union assessments from my wages, in the amounts specified in writing by Local One, and direct that you remit same to Local One.

This authorization shall remain in effect unless and until revoked by me as hereinafter provided and shall be irrevocable for a period of one (1) year from the date hereof or

(continued...)

Employees were additionally directed to their Union representative for any

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(...continued)

until the termination of the collective-bargaining agreement between the Company and Local One, whichever occurs sooner.

I further agree and direct that this authorization shall be automatically renewed for successive periods of one (1) year or for the period of each succeeding applicable collective bargaining agreement, whichever is shorter, and shall be irrevocable during each such renewal period, unless written notice of revocation is given by me to the Company and Local One not more than twenty (20) days and not less than ten (10) days prior to the expiration of each renewal period of one (1) year or prior to the termination of each applicable collective bargaining agreement, whichever occurs sooner.

Gary Russo	**Gary Russo**	**143 66-315**
Member's Signature (Signed)	**Print Member's Name**	**No.**

120766.1

questions or further details regarding these changes.

[*31]

On March 10, 1998 the Union filed charges against the Respondent in Case No. 29-CA-21820 alleging, inter alia, the Respondent's unlawful insistence to impasse over the Inter-Local Fund as a non-mandatory subject of bargaining. On April 29, 1998, the Union filed a charge in Case No. 29-CA-21963, alleging the Respondent's unilateral action in ceasing to deduct and remit dues to the Union from the employees pay. During the investigative stage of the unfair labor practice charges by Region 29, Board Agent Ann Lesser, and the Respondent's attorney Allen Roberts, discussed the Respondent's position as to the Inter-Local Fund contributions being a non-mandatory or mandatory subject of bargaining. The Respondent submitted that the Inter-Local Fund was a mandatory subject of bargaining, that the Respondent's insistence on employee choice with respect to the mandatory 2% contributions required by Union membership could be addressed with its proposal that union membership become voluntary through elimination of the union security clause, and that its

intent was not to "meddle" in the internal affairs of the Union.

At the trial, attorney Roberts testified that on May 6, 1998, Ms. Lesser called [*32] him on two occasions and advised that the Region was likely to issue a complaint in the case and that the Union was asking the Region to seek injunctive relief under Section 10(j) of the Act. Roberts stated that having one week to respond to the possible issuance of the complaint and a Section 10(j) petition and upon his recommendation to the Respondent, by letter dated May 8,1998, the Respondent's Executive Vice President, Nubar Nakashian wrote to Union President Patrick LoPresti, proposing-for-the first-time-the-elimination of union security and dues check-off provisions from the proposed contracts. Roberts related that "I thought we had a proposal that would bring them back to the table", and characterized the proposal in the letter as being an "impasse breaking proposal," and one indication that the Respondent had "no intention of bargaining about . . . subjects that relate to internal union affairs". The Respondent also asked in the letter that the Union contact it regarding resumption of the negotiations and any request to "discontinue the pay and benefits practices implemented after

March 9 consistent with Quality's last offer" for the Respondent's consideration. However, the [*33] union did not request any further bargaining in response to the Respondent's May 8, 1998 letter and no further bargaining sessions were held between the parties after the March 9, 1998 bargaining meeting.

Credibility

Regarding the credibility of the respective parties witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole, *New York University Medical Center*, 324 NLRB 887, (1997), enfd., 156 F.3d 405 (2nd Cir. 1998); *Gold Standard Enterprises, Inc.* 234 NLRB 618 (1978); *V&W Castings*, 231 NLRB 91.2 (1977), *Northridge Knitting Mills1*, 223 NLRB 230 (1976).

The General Counsel's sole witness was the Union's vice president, Robert Mitchell. While his testimony at times evidenced instances of a lack of remembrance and at other times admittedly omissions in his notes of the bargaining

sessions, [*34][17] still, I found that his testimony was given in a forthright manner, with an intent to honestly and as completely as possible explain what had occurred at the negotiation meetings between the parties and therefore quite believable and credible. Furthermore, of significance in crediting Mitchell's testimony is the Respondent's failure to call either John Aslanian its owner, Nubar Nakashian, its executive vice president, or Chuck Appelian who were present at the negotiations, as a witness to rebut Mitchell's testimony as given herein, although they each were knowledgeable regarding the negotiations and might well have been able to specifically detail and/or clarify what had occurred.[18] Moreover, the Respondent

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[17] Mitchell explained that he did not write down everything word for word during the negotiations.

[18] From the failure of a party to produce material witnesses or relevant evidence obviously within its control without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. *Walter Jack and Dixie A. Macy d/b/a 7-Eleven Food Store,*

(continued...)

called three witnesses, CFO. Doug Schara, Joseph Barclay, a member of the bargaining unit, and Allen Roberts, the Respondent's attorney. The testimony of these witnesses generally either corroborated or left unrebutted that of Mitchell's.[19]

This is not to say that I disbelieved all the testimony of the Respondent's witnesses. Their testimony covered mostly events occurring after the

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(...continued)
257 NLRB 108 (1981); *Publisher Printing Co., Inc.*, 238 NLRB 1070 (1977). [*35]

[19] For example, Schara's notes confirmed Mitchell's testimony that the parties believed that agreement could be had on wages but the problem of the pension funds was the "sticking point." His notes and testimony also show that the Union had consistently maintained that for contributions to the pension funds to become voluntary, the pension fund would have "to revise its rules and regulations", and that the parties were at impasse. Additionally, the Respondent stipulated that, prior to the March 9 impasse, it had never proposed eliminating or modifying the contracts' union security and check-off provisions as part of any proposal.

negotiations had ended on March 9, 1998. While Schara's testimony generally concerned the Respondent's efforts after March 9, 1998, to implement the Respondent's final offer he also testified somewhat about what occurred at the negotiations. Barclay testified about the Union's reactions following the impasse, and Roberts related [*36] his discussions with the investigating Board Agent and the Respondent's attempts to circumvent the Region's issuance of a complaint and a 10(j) petition, by proposing to break the impasse and recommencing negotiations. However, based on their demeanor and other facts in the record I found these witnesses to be less trustworthy.

B. Analysis and Conclusions

The second consolidated amended complaint alleges that the Respondent has failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act, by unlawfully bargaining to impasse on a non-mandatory subject of bargaining, namely, the issue of the Inter-Local Pension Fund, as a condition precedent to reaching final agreement on successor collective-bargaining agreements; by implementing unilaterally its final offer at a time when no legitimate impasse had

been reached and without affording the Union the opportunity to bargain further with it; by unilaterally ceasing the deduction and remittance of employees dues payments to the Union[20], without affording notice to the union and the opportunity to bargain with it concerning the discontinuance of dues checkoff; and by making a regressive [*37] bargaining proposal after being informed of the Region's intention to issue a complaint.

The Impasse Issue

Section 8(a)(5) and 8(d) of the Act require an employer to bargain in good faith with the collective-bargaining representative of its employees with respect to wages, hours and other terms and conditions of employment.[21] As the

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[20] The collective bargaining agreements which expired on January 31, 1998 contained union security clauses and employees dues payments were deducted and remitted to the Union pursuant to voluntary written authorizations from the employees in Units A and B.

[21] Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain

(continued...)

United States Supreme Court stated in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958):

Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours and other

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(...continued)
collectively with the representatives of his employees. . . ."

Section 8(d) of the Act defines collective bargaining as follows:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

terms and conditions of employment. . . . The duty is limited to those subjects, and within that [*38] area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree. . . . But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. . . . Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether . . . a subject [falls] within the phrases "wages, hours and other terms and conditions of employment" which defines mandatory bargaining.

From the above it is clear that while employers and unions are also permitted to make proposals and bargain over so-called "non-mandatory" or "permissive" subjects, neither party may lawfully insist on a non-mandatory provision, over the other party's objection, as a condition to reaching an overall agreement and such insistence to impasse on a non-mandatory topic

constitutes, in effect, an unlawful [*39] refusal to bargain over the mandatory subjects.[22]

Pension and insurance benefits for active employees have been held to be mandatory subjects of bargaining as concerning "other terms and conditions of employment.[23] However, an issue [*40] in this case is whether the Respondent failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act by insisting to impasse on an alleged non-mandatory subject of bargaining, namely, the Inter-Local Pension Fund. The General Counsel and the Union assert that the Inter-Local Pension Fund contributions constitute a non-mandatory subject of bargaining since it "deals only with relations between the employees and their union."[24] The Respondent, instead, alleges that the Inter-Local Fund contributions of its

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[22] *NLRB v. Woloser Division of Borg-Wamer, supra.*

[23] Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

[24] *Borg-Warner, supra* at 350.

employees, "are part and parcel of their overall employment terms and conditions and hence a well-established subject of mandatory bargaining.[25]

[*41]

Both the courts and the Board have held that strictly internal union matters, between a union and its members are non-mandatory subjects of bargaining over which an employer may not hold a contract hostage. For example, in Borg-Warner, supra, the employer insisted, as a condition of reaching agreement, on a contractual "ballot clause" provision setting certain requirements and procedures for a strike-vote. The Union made it clear that it would not accept the proposed ballot clause under any circumstances. The Supreme Court held that the ballot clause did not concern any term or condition of employment, but rather, that it concerned only the relations between employees and their union. The Court thus found that the employer violated Section 8(a)(5) of the

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[25] Citing *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *Pittsburgh Plate Glass, supra; Handelman Company*, 283 NLRB 451 (1987); *NKS Distributions, Inc.*, 304 NLRB 338 (1991).

Act by insisting to impasse over the inclusion of the ballot clause, a non-mandatory subject of bargaining. Also, in *Betra Manufacturing Company*, 233 NLRB 1126 (1977), enf 'd 624 F.2d 192 (9th Cir. 1980), cert. den. sub nom. Thomas v NLRB, 450 U.S. 966 (1981), the employers unlawful insistence on a contractual clause [*42] providing that any change in the union's constitution, by-laws or affiliation would invalidate the contract was found to be a violation of Section 8(a)(5) of the Act since this involved the matter of the Union's "internal structure or rules" which constituted a non-mandatory subject of bargaining, dealing with "relations between employees and their union." (Citing *Borg-Warner, supra*).[26] Similarly, in *UOP Norplex*

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[26] Also see, Houchens Market of Elizabethtown, Inc., 155 NLRB 729 (1965), enf 'd 375 *F.2d 208* (1967)(employee ratification of contract, a non-mandatory subject of bargaining); Service Employees Local 535 (North Bay Regional Center), 287 NLRB 1223 (1988), enf'd 905 F.2d 476 (D.C. Cir 1990), cert. denied 498 U.S. 1082 (1991)(amount of union's "agency fees" a non-mandatory subject of bargaining); *International Union of Bricklayers and Allied Craftsmen*, 306 NLRB 229, (1992)

(continued...)

Division of Universal Oil Products, 179 NLRB 657 (1969), enf 'd 445 F.2d 155 (7th Cir. 1971) the Board held that the employer violated Section 8(a)(5) of the Act by insisting as a condition of reaching a collective-bargaining agreement, that the union withdraw fines it had imposed against members who crossed a picket line and returned to work during a strike. The Board found the subject of a union's fines against its own members to be a non-mandatory subject of bargaining.

[*43]

Moreover, a policy explicitly incorporated into the Act by Congress is the avoidance of "outside interference in union-decision making."[27] Therefore, the proviso to Section 8(b)(1)(A) of the Act

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(...continued)
(amount of union dues a non-mandatory subject); and *Mid-thate Ready Mix, a Division of Torrington Industries, Inc.*, 307 NLRB 809 (1992) a union's selection of its steward/grievance representative a non-mandatory subject of bargaining).

[27] *NLRB v. Financial -Institution Employees Local 1182*, 471 U.S. 1098 (1986).

protects "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." As a result, internal affairs of labor organizations are not "an aspect of the relationship between the employer and the employees,"[28] but rather, by statutory definition are encompassed by the relationship between labor organization and employees. It follows that subjects embraced by the internal affairs proviso are non-mandatory ones which concern relations between the employees and their union and not mandatory subjects regarding the employees and their employer.

The record [*44] evidence in this case establishes that the Inter-Local Pension Fund is an internal union matter, involving only the Union's relations with its members. Contributions to the Inter-Local are made by union members only and not by the Respondent or any other employer. The fund is neither created nor governed by any collective-bargaining agreement, and the right to participate in the Inter-Local Fund is governed only by the Union's constitution and by-laws,

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[28] *Allied Chemical Workers v. Pittsburgh Plate Glass, supra.*

and has nothing to do with the employees terms and conditions of employment.[29] "Financial-core" members who choose not to become full union members are not required to participate. The Inter-Local Fund is merely a supplemental pension program that the Union established as part of full union membership with the level of contributions required determined by the union members themselves under the Union's own internal rules.[30] The Respondent has no

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[29] Also see Internal Revenue Code Section 501(c)(18) which provides a tax exemption for certain trusts funded only by contributions of employees.

[30] Section 8(b)(1)(A) of the Act states that it "shall not impair the right of a labor organization to prescribe its own rules with respect of the acquisition or retention of membership therein." Moreover, in *Scofield v. NLRB*, 394 U.S. 423 (1969), the Supreme Court upheld a union's right to enforce a rule regarding membership, as long as the rule is "properly adopted", "reflects a legitimate union interest," "impairs no policy Congress has imbedded in the labor laws", and is "reasonably enforced against union members who are free to leave the union

(continued...)

involvement whatsoever in the Inter-Local Fund except that, as a convenience, it deducts members, contributions from their earnings and remits the contributions to the Union under a checkoff-type mechanism. Thus, the Inter-Local Pension Fund is an internal union matter over which, as a non-mandatory [*45] subject of bargaining, the Respondent may not legally insist to impasse.

The evidence herein shows that the Respondent throughout the negotiations indeed insisted to impasse on its pension proposals, including its proposal [*46] to make the Inter-Local Fund "voluntary" for Union members. During the negotiations the Respondent refused to withdraw its proposal 6(c), despite the Union's repeated objections that the Inter-Local Fund was an internal matter between the Union and its members, governed by the Union's by-laws and procedures and that the Inter-Local Fund was none of the Respondent's business. Moreover, the Union advised the Respondent that it would not bargain with the Respondent over changes in its by-laws and membership requirements as would be required under the Respondent's

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(...continued)
and escape the rule." 394 U.S. at 430, 70.

pension proposals. It became clear to the parties that the pension issues (including the Inter-Local Fund) became the "sticking point" or "logjam" in the negotiations and wages were not the "problem." The Respondent continued to insist that contributions to the Inter-Local Pension Fund be made voluntary as well as other pension proposals as a condition for reaching overall bargaining agreements. The Respondent's proposal 6(c) regarding the Inter-Local Pension Fund remained as part of the Respondent's final offer when it declared impasse at the last negotiation session on March 9, 1998. The Respondent's insistence upon what amounted [*47] in affect to a change in the Union's internal membership requirements and rules (that contributions to the Inter-Local Pension Fund be made voluntary) found hereinbefore to be a non-mandatory subject of bargaining and upon which the Respondent could not lawfully insist to impasse, constituted a violation of its duty to bargain in good faith within the meaning of Section 8(a)(5) of the Act.[31]

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[31] *Borg-Warner Corp., supra; Betra Manufacturing Company, supra; UOP Norplex Division of Universal Oil Products, supra; Houchens Market of Elizabethtown, Inc.,*

(continued...)

The Respondent in its brief states that the Inter-Local Pension Fund contributions of its employees [*48] are part of their employment terms and conditions and "hence a well-established subject of mandatory bargaining, *Pittsburgh Plate Glass,* 404 U.S. at 180 . . . irrespective of whether the funding of those benefits is employer contributions or employee payments in the form of a mandated payroll deduction." The Respondent continues:

Quality's proposal with respect to the Inter-Local Fund - consistent with its conceitedly lawful SRDF proposal - took note of this judicially recognized reality. . . . Because the Inter-Local Fund - unlike the SRDF - did not entail employer contributions. Quality presented across the bargaining table a Photo-Industrial proposal accomplishing the same end: employees would have an opportunity for the "2% involuntary

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(...continued)
supra; International Union of Bricklayers and Allied Craftsmen, supra; Mid-State Ready-Mix, a Division of Torrington Industries, Inc., supra; Service Employees Local 1535 (North Bay Regional Center), supra.

contribution" to the Inter-Local Fund to be voluntary.

However, as found by me above, contributions to the Inter-Local Fund was a non-mandatory subject of bargaining to which the Respondent could not insist to impasse. Moreover, the fact that the Respondent's proposal 6(a) regarding the SRDF also contributed to the impasse does, not preclude a finding that the Respondent bargained unlawfully with regard to the Inter-Local [*49] Fund. The Board has consistently held that "Where an impasse has been created even in part by insistence on bargaining about a permissive subject, such an impasse is not valid under the Act.[32] Insisting to impasse on a non-mandatory subject is a per se violation of Section 8(a)(5) of the Act, regardless of what other issues

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[32] *Retlaw Broadcasting Company*, 324 NLRB No. 18 (1992), citing *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988) ("none of the terms of the final offer predicated on such an improper impasse can be lawfully implemented"); *Boise Cascade Corp.*, 253 NLRB 462 (1987). Also see *Betra Mfg.*, *supra*.

may still have been in dispute at the time of the impasse.[33]

The [*50] Respondent, in support of its position herein also cites *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). In that case the Supreme Court stated:

Under the second proviso to Section 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. "Membership" as a condition of employment is whittled down to its financial core.

Moreover, the United States Court of Appeals in *William v. NLRB*, 105 F.3d 787, 792 (2nd Cir. (1996) (citing *Communications Workers v. Beck*, 487 U.S. 7315 (1988) said, "Under Section 8(a)(3), the membership, that can be required by a union-security clause and from which an employee cannot resign includes the obligation to pay diminished dues to support union activities that are germane

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[33] "[A] permissive subject of bargaining [does not] become mandatory [merely because] it [is] presented together with a mandatory subject," *Borden, Inc.*, 279 NLRB 396 (1986).

to collective bargaining, contract administration, and grievance adjustment."[34]

[*51]

From the above, the Respondent argues that this "financial core" does not include the obligation to support non-representational union activities beyond those germane to collective-bargaining, contract administration, and grievance adjustment.[35] The Respondent maintains that the Inter-Local Pension Fund contribution have nothing to do with union dues and instead, relate directly to the employer-employee relationship, and that its proposal 6(c) concerning the Inter-Local Fund contributions was clearly within the ambit of lawful, mandatory bargaining.[36]

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[34] *Communications Workers v. Beck*, 487 U.S. at 745.

[35] *Communications Workers v. Beck*, *supra*.

[36] The Respondent cites *Ford Motor Company v. NLRB*, 441 U.S. at 501 and *Handleman Company*, *supra*. Both cited cases are easily distinguishable since the

(continued...)

However, [*52] it should be remembered that pursuant to the second proviso of Section 8(a)(3) of the Act, under a union-security clause employees are only obligated to join the Union as "financial core" members. Herein only those voluntarily choosing to join the Union as full members were subject to the Inter-Local Pension Fund contributions. Clearly, the latter relationship applied solely to the Union and its membership. Moreover, as found above, the Inter-Local Pension Fund was an non-mandatory subject of bargaining and the Respondent's insistence to impasse over this issue as a requirement to negotiating successor collective-bargaining agreements was unlawful.

The Respondent also asserts that since its Proposal 6(c) only referred to the Photo-Industrial employees, contributions to the Inter-Local Pension Fund (2%) therefore, "because Inter-Local

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(...continued)
subject in question in Ford was a plant food provision and in *Handleman* a stock purchase program, benefits conferred by the respective employers upon the employees that was in the employer's control.

contributions were not an issue in the Photo-Engravers negotiations, there is no factual or legal support for a claim that impasse was unlawful." I do not agree.

According to the uncontroverted testimony of Mitchell, throughout the negotiations the Respondent insisted that all its employee contributions to the Inter-Local Pension Fund be voluntary. [*53] This included employees of both the Photo-Industrial and Photo-Engraver units, without distinguishing between the Photo-Industrial and Photo-Engravers collective-bargaining agreements. Notwithstanding that its Proposal 6(c) related only to the Photo-Industrial Inter-Local Pension Fund contributions, and I am aware that there were aspects of the two bargaining agreements that were being negotiated separately, still the Respondent's bargaining position on the Inter-Local Pension Fund throughout the negotiations and on March 9, 1998 when its impasse declaration ended the negotiations for good, was that all Inter-Local Fund contributions should be made voluntary. It is clear from the record that this affected dramatically the entire negotiations for the two new successor agreements. The Respondent's insistence to impasse on a non-mandatory subject of bargaining, as found by me above, which in effect concerned both

agreements, violated Section 8(a)(5) of the Act.

The Respondent additionally alleges that to the extent the Photo-Industrial negotiations reached impasse over the Inter-Local Pension Fund contributions, it is because the Union "knowingly misrepresented" to the Respondent that [*54] participation in the Inter-Local Fund was a mandatory incident of union membership and could not be made voluntary under the Union's by-laws. The Respondent maintains that by failing to mention to the Respondent that "financial core" members are not required to contribute to the Inter-Local Pension Fund the issue of the Inter-Local Fund contributions remained an active topic of discussion because of the Union's "misrepresentation about the availability of voluntary participation."

However, I do not understand, nor does the Respondent in its brief clarify how the Union's failure to disclose the fact at the negotiation meetings that "financial core" members were not required to contribute to the Inter-Local Pension Fund could have changed either the Union's position during the negotiation sessions that the Inter-Local Fund was strictly an intra-Union affair between it and its Union members, and the

Respondent's insistence that all contributions to this Fund be made voluntary. True to its by-laws as indicated to the Respondent, full Union members were obligated to contribute to the Inter-Local Pension Fund and despite the exclusion of "financial core" members in this respect, it changed [*55] nothing and still required the Union to amend its by-laws to comply with the Respondent's bargaining demand as to making voluntary, employee contributions to the Inter-Local Fund. Under *NLRB v. General Motor Corp., supra* the only membership a bargaining agreement can require as a condition of employment is a "financial core" membership, limited to the payment of periodic dues and initiation fees and employees cannot legally be required as a condition of employment to join the Union as full members. But, once employees have chosen to join as full members, the Union can prescribe its own rules with respect to those members, including participation in the Inter-Local Pension Fund.

The Respondent raises other issues in its brief all based upon its assertion that the Inter-Local Pension Fund contributions were a mandatory subject of bargaining. For example: that the Union's adoption of by-law provisions with respect to mandatory bargaining subjects (Inter-Local Pension Fund contributions)

can not operate to strip those topics of their statutorily created status as mandatory subjects of bargaining.[37] Moreover, the Respondent states that not only do the [*56] payments to the Inter-Local Fund fail to qualify as statutory "membership dues,"[38] but they fail to

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[37] Citing *Brotherhood of Painters, Decorators & Paperhangers, District Council No. 9,* 186 NLRB 964 (1970) enforced sub nom. *New York District Council No. 9, Int'l Brotherhood of Painters & Allied Trades v. NLRB,* 453 F.2d 783 (2d Cir. 1971), cert. denied 408 U.S. 930 (1972); *Associated Musicians of Greater New York, Local 802,* 164 NLRB 23 (1967), enforced sub nom. *Cutler v. NLRB,* 395 F.2d (2d Cir. 1968). Having found herein that the Inter-Local Pension Fund contributions constitute a non-mandatory subject of bargaining, these cases would not be applicable. [*57]

[38] The Respondent states that "clearly, pension fund payment exacted from employees do not qualify as 'financial core' payments necessary for the performance of Local 1-L's duties as the exclusive representatives of employees in dealing with employers on labor-management issues. *Communication Workers*

(continued...)

conform to the mandate of Section 302 of the Act because the Inter-Local Fund does not satisfy threshold requirements of protective provisions of Section 302(c)(5)(B). The Respondent continues that because payments to the Inter-Local Fund are not to be equated with membership dues, there is no legitimacy to an allegation that it was subject to a Section 8(a)(5) obligation to make Inter-Local Fund remittances as it did with membership dues or was obligated to bargain with the Union as though fund contributions were membership dues. As to the above, whatever the Respondent's position on this is, the record evidence clearly shows that the Respondent insisted on its proposal to change Union member's obligations to the Inter-Local Pension Fund, a non-mandatory subject over which the Respondent was not free to insist. By insisting to impasse on its Inter-Local fund proposal, the Respondent violated its duty under Section 8(a)(5) of the Act to bargain in good faith with the Union.

The Unilateral Implementation of The Respondent's Final Offer

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(...continued)
v. Beck, [supra]."

Having found herein that the Respondent failed and refused to bargain with the Union in good faith when it unlawfully insisted to impasse on a non-mandatory subject of bargaining in order to reach collective-bargaining agreements, the impasse which existed on March 8, 1998 was not a legitimate impasse. Moreover, the Board has consistently held that when an employer's bad-faith bargaining or unfair labor practice precludes an agreement, the resulting impasse is tainted and invalid. Thus, any unilateral changes that the employer makes thereupon are illegal.[39] An impasse even where created in part by insistence on bargaining about a permissive subject, is invalid under the Act, and [*58] none of the terms of a final offer predicated on such an improper impasse can be lawfully implemented.[40]

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[39] *United Contractors*, 244 NLRB 72 (1979); *Intermountain Rural Electrical Assn.*, 305 NLRB 783 (1991); *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1008 (1994).

[40] *Boise Cascade Corp.*, 253 NLRB 462 (1987); *Retlaw Broadcasting Company*, *supra*.

While the record evidence indicates that the parties had made some progress in narrowing the open issues and that neither side believed that wages would be a problem, the Respondent's insistence on making contributions to the Inter-Local Pension Fund voluntary a non-mandatory subject of bargaining, over the Union's objection, resulted in an improper impasse declaration. Therefore, when the Respondent unilaterally implemented its final offer after March 9, 1998, at a time when no valid impasse had been reached it [*59] violated Section 8(a)(5) of the Act.

The Dues Checkoff Issue

Pursuant to the parties check-off agreements, and with written authorizations from employees, the Respondent had previously deducted the photo-engravers' and photo-industrial employees, dues payments from their wages and remitted these payments to the Union. The check-off agreements do not appear to be expressly or automatically limited in time to the contract's duration, although employees may choose to revoke their check-off authorizations at certain times (including after one year or after contract expiration) by submitting a written revocation to the Respondent. In early March, 1998, after the parties'

collective-bargaining contracts and their 30-day extension period had expired, the Respondent ceased deducting and remitting dues payments to the Union, although there is no evidence in the record that any employees had actually revoked their dues checkoff authorizations in writing.

In accord with Board and court decisions, union security and dues checkoff are matters related to "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act and, therefore, are mandatory [*60] subjects for collective bargaining.[41] However, in *Bethlehem Steel Company*, 136 NLRB *supra* at 1502, the Board held that, notwithstanding that union security and checkoff are issues that normally affect the terms and conditions of employment, the Employer did not violate Section 8(a)(5) of the

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[41] *Bethlehem Steel Company*, 136 NLRB 1500 (1962), enforced in relevant part sub nom. *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 Ord Cir. 1963), cert den. 375 U.S. 984 (1965); *NLRB v. The Proof Company*, 242 F.2d 560 (7th Cir. 19); *NLRB v. Reed & Prince Manufacturing Company*, 205 F.2d 131 (1st Cir. 19); *United States Gypsum Company*, 94 NLRB 112 (199).

Act when after the expiration of its agreement with the union it unilaterally ceased giving effect to the union security and dues checkoff provisions in the expired contract. This precedent, established in Bethlehem steel, has since been affirmed in numerous Board and United States Court of Appeals cases,[42] and was implicitly approved in United States Supreme Court dicta. See *Litton Financial Printing v. NLRB*, 501 U.S. 190, 199 (1991) wherein the Supreme Court stated:

> The Board has ruled that most mandatory subjects of bargaining are within the [NLRB v.] Katz prohibition on unilateral changes. The Board has identified some terms and conditions of employment, however, which do not survive expiration of an agreement for purposes of this statutory policy. For instance, it is the Board's view that union

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[42] *See e.g. Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217 (1st. Cir. 1996); *Indiana &Michigan Electric Co.*, 284 NLRB 53 (1987); *Southwestern Steel Supply v. NLRB*, 806 F.2d 1111 (D.C. Cir. 1986); *Robbins Door & Sash Co., Inc.*, 260 NLRB 659 (1982); *Ortriz Funeral Home Corp.*, 250 NLRB 730 (1980), enf 'd 651 F. 2d 136 (2nd Cir. 1981). [*62]

security and dues check-off provisions are excluded [*61] from the unilateral change doctrine because of statutory provisions which permit these obligations only where specified by the express terms of a collective-bargaining agreement. See [Section 8(a)(3)] (union security conditioned upon agreement of the parties); [Section 302(c)(4)] (dues check-off valid only until termination date of agreement); *Indiana & Michigan*, 284 NLRB at 55 (quoting *Bethlehem Steel*, 136 NLRB at 1502).[43]

In *Bethlehem Steel*, the parties collective-bargaining agreements contained both a union security clause and a dues checkoff provision. The Board's holding in that case was based on an acknowledgment that union security

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[43] The Board has long held that most terms and conditions of employment established in a collective-bargaining agreement survive expiration of the agreement and cannot be changed by the employer without first bargaining to impasse with the union. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Compton-Highland Mills, Inc.*, 337 U.S. 217 (1949); *Harold Hinson d/b/a Hen House Market No. 3*, 175 NLRB 596, enf 'd 428 F.2d 133 (8th Cir. 1970).

requirements can be imposed only under a contract that conforms to the proviso of Section 8(a)(3) of the Act. And although dues checkoff arrangements are not expressly referenced in Section 8(a)(3), the Board in *Bethlehem Steel* found that "The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions," C-631 and therefore *also* exist *only* so-long as the contracts remained in force as did the union-security provisions.[44] The agreements in Bethlehem Steel contained the following dues checkoff provisions, "The Company will, beginning the month in which this Agreement is signed and so long as this Agreement shall remain in effect, deduct from the pay of such Employee each month ... his periodic Union dues for that month." Thus, in *Bethlehem Steel* the contractual checkoff provisions were explicitly limited by the duration of the collective-bargaining agreements.[45]

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[44] *Bethlehem Steel Company*, 136 NLRB at 1502.

[45] Hence the Board's reasoning that "the Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created

(continued...)

[*64]

The rationale that underlies Bethlehem Steel's holding regarding dues checkoff is that union security and dues checkoff arrangements are so interrelated, that to enforce dues checkoff in the absence of a contract would constitute a violation of Section 8(a)(3) which requires a contract for the enforcement of union security, even though Section 8(a)(3) even though Section 8(a)(3) does not explicitly mention dues checkoff.[46] Moreover, in *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 54 (2nd Cir. 1967) the Court

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by the contracts and became a contractual right which continued to exist so long as the contracts remained in force." *Bethlehem Steel*, 136 NLRB at 1502. Since *Bethlehem Steel*, union security and dues checkoff have been viewed solely as contractual matters, and as such have been exempt from the unilateral change doctrine.

[46] *Bethlehem Steel Company*, 136 NLRB at 1502 ("The checkoff provisions in Respondents' contracts with the Union implemented the union-security provisions.")

noted that where a contract contains both a union security clause and a dues checkoff agreement, it is logical to conclude that an employee who authorizes his individual checkoff arrangement does so because of the union security clause (". . . [where a contract contains both clauses] an employee is likely to authorize a dues checkoff for fear that without it he may forget to make the payments and risk dismissal for failure to pay union dues.")

[*65]

In substance, the Board has confirmed that union security is "inherently and solely a contractual matter, and an employer's refusal to enforce a union-security provision without a proper contractual basis is in accordance with the mandate of the Act." *Indiana & Michigan Electric Co.*, 284 NLRB 53, 55 (1987) (quoting Bethlehem Steel, supra). Consistent with the reasoning that union security and dues checkoff are creatures of contract, a unions right to receive remittances pursuant to dues checkoff authorizations is held to be extinguished upon expiration of the collective-bargaining agreement creating

that right.[47] Consequently, the Board has declined to find their unilateral abandonment after contract expiration to be unlawful. *Indiana & Michigan, supra.*

[*66]

Counsel for the General Counsel states in her brief that:

Id. Unfortunately, perhaps because Bethlehem Steel's contracts explicitly limited the checkoff provision to the duration of the contracts, the Board unnecessarily conflated the union security provision with the dues checkoff provision, when they are actually two separate issues. Since then, the *Bethlehem Steel* case has been interpreted to stand for the broad proposition that employers can unilaterally cease dues checkoff after contract expiration without violating Section 8(a)(5). See, e.g. *Robbins Door & Sash Co., Inc.*, 260 NLRB 659 (1982).

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[47] *Bethlehem Steel Co., supra; Ortiz Funeral Home Corp., supra; Sullivan Bros. Printers, Inc. v. NLRB, supra; Southwestern Steel & Supply Inc. v. NLRB, supra.* Also see *Litton Financial Printing v. NLRB, supra.*

The General Counsel points out that it is "illogical, to apply this broad proposition in cases where a contract's checkoff provision is not limited in time to the contract duration, and argues that there is no reason to assume that employees who authorize dues checkoff from their wages do so solely because of the contractual union security requirements. Employees may very well wish to continue their union membership's and have dues deducted and remitted in financial support of the union after the contract expired, or also for convenience.[48]

[*67]

The General Counsel also maintains that:

An Employer would not violate Section 8(a)(3) of the Act by honoring an employees' voluntary authorization of dues deduction. Where the checkoff mechanism is not explicitly limited to the duration of the contract, and where employees have not in fact revoked their

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[48] *See Lowell Corrugated Container Corp.*, 177 NLRB 169, *173* (1969) and cases cited therein, affirmed 431 F.2d 1196 (1969).

checkoff authorization, the checkoff mechanism should be treated like any other term and condition of employment (such as wages and fringe benefits), which an employer may not change after contract expiration without giving the union notice and an opportunity to bargain.

The General Counsel argues that in view of the above the Respondent in this case violated Section 8(a)(5) of the Act by unilaterally ceasing its deduction and remittance or employees, dues payments, a mandatory subject of bargaining, without giving the Union notice and an opportunity to bargain. "To the extent that Bethlehem Steel has been interpreted otherwise, it should be overruled."

However, notwithstanding its ruling in the *Bethlehem Steel* case, the Board has also held that it does not violate Section 8(a)(3) of the Act to checkoff dues in the absence or expiration of a collective-bargaining agreement. [*68][49]

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[49] *See, e.g. Lowell Corrugated Container Corp.*, 177 NLRB at 173 (employer did not violate section 8(a)(2) and (3) of the Act by continuing to honor unrevoked checkoff authorizations after expiration

(continued...)

Nor does it violate Section 302 of the Act, which requires written authorization by an employee before dues can be deducted, but does not require an agreement between the employer and the union.[50]

(...continued)
of the collective-bargaining agreement); *Sun Harbor Caribe, Inc.*, 237 NLRB 44 *(1978). See also, International Chemical Workers Union Local 143 (Lederle Laboratories)*, 188 NLRB 705 (1971) (union did not violate Section 8(b)(1)(A) of the Act when it demanded that dues be checked off during a contractual hiatus period pursuant to unrevoked checkoff authorizations).

[50] *See Gulf-Wandes Corp.*, 236 NLRB 810 (1978). Also, Section 302(c)(4), requires a "written assignment" from each employee where dues are deducted and remitted to the union, ". . . which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner. . . ." Thus Section 302(c)(4) references the collective-bargaining agreement regarding the period of a checkoff agreements irrevocability and does not suggest that a
(continued...)

[*69]

Moreover, the Board and courts have indicated that although union security and checkoff go hand-in-hand, they are markedly different kinds of obligations that should not necessarily be treated as legally inseparable.[51] Unlike union

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(...continued)
collective-bargaining agreement is required for a dues checkoff arrangement to be valid. However, see *Litton Financial Printing v. NLRB*, 501 U.S. 190, 199 (1991) (suggesting that Section 302(c)(4) does require a collective-bargaining agreement for a dues checkoff arrangement to be valid).

[51] *Shen-Mar Food Products*, 221 NLRB 1329 (1976), enf 'd as modified 5.57 F.2d 396 (4that cir. 1977); *NLRB v. Atlantic Printing Specialties and Paper Products Union Local 527 (Mead Corp.)*, 90 LRRM 3121, 3124 (5th Cir. 1975); *International Brotherhood of Electrical Workers, Local 2088 (Lockheed Space Operations Company)* 302 NLRB 322 (1991) (checkoffs must be evaluated differently depending on whether they were executed pursuant to a union security requirement or otherwise). However, the Board has on occasion stated
(continued...)

security agreements, for example, checkoff agreements give rise to independent wage assignment contracts between the employees and employer that have been held to survive the expiration of the collective-bargaining agreement when the parties so intend.[52] Additionally, Section 302 requires only that written authorization from employees for checkoff be revocable at the end of a collective-bargaining agreement, implying that, absent revocation, they survive, and the legislative history of Section

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(...continued)
the rule regarding non-survival of checkoff requirements broadly, without any references to the relationship between a checkoff clause and a union security requirement. Sweet-Kleen Laundry & Dry Cleaning, Inc., [ILLEGIBLE NUMBER] NLRB No. 121 (1991); *AMBAC International Limited*, 299 NLRB 505, 507 n. 8 (1990); [ILLEGIBLE WORD] *Maintenance Corp.*, 260 NLRB 1211 (1982). [*70]

[52] *See, e.g. Frito Lay, Inc.*, 243 NLRB 137 (1979); *Associated Press*, 199 NLRB 1110 [ILLEGIBLE NUMBER]); *International Brotherhood of Electrical Workers, Local 2088 (Lockhead Space Operations Company) supra* and cases cited therein.

302 supports the view that checkoff authorizations "may continue indefinitely until revoked", 11 Leg. Hist. 1304, 1311 (1947).

As stated above, the Board has reasoned that union security and dues checkoff are creatures of contract, and a union's right to receive remittances pursuant to dues checkoff authorizations exist only as long as the contract creating that right remains in force.[53] Consequently, the Board declines to find their unilateral abandonment after contract expiration to be unlawful.[54] I am bound to apply established Board precedent which the United States Supreme Court has not reversed.[55] But the Board

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[53] *Bethlehem Steel Co., supra; Ortiz Funeral Home Corp., supra; Sullivan Bros. Printers, [ILLEGIBLE WORD] v. NLRB,* 99 F.3d 1217 (1st Cir. 1996) at 1232 (quoting *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB,* 501 U.S. 190 (1991)). [*72]

[54] *Indiana & Michigan,* 284 NLRB at 59.

[55] *Riser Food, Inc.,* 309 NLRB 435 (1992); *Roofing, Metal & Heating* (continued...)

and courts have recognized that dues checkoff arrangements in some instances may exist in the absence of a union security clause.[56] Perhaps the inconsistencies between the reasoning in Bethlehem Steel and Lowell Corrugated may well warrant the Board's reexamining its rulings regarding [*71] this issue. Of course any reevaluation of this area of Board precedent cannot disregard the realities surrounding the institutions of union security and dues checkoff.[57] The

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(...continued)
Associates, Inc., 304 NLRB 155 (1991); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Lenz Co.*, 153 NLRB 1399 (1965); *Iowa Beef Packers*, 144 NLRB 615 (1963).

[56] *Lowell Corrugated Container Corp., supra; Sun Harbor Caribe, Inc. supra; Penn Cork & Closures, Inc., supra.*

[57] The Board has held in *Sun Harbor Caribe, Inc., supra;* and *Lowell Corrugated Container Corp., supra*, that an employer who has a valid dues checkoff agreement from an employee, does not commit a violation of Section 8(a)(2) or 8(a)(3) of the Act when the employer continues to remit payment to a union after the expiration of a collective-bargaining

(continued...)

Board may find that in practice union security is the procuring cause of dues checkoff and thus create a rebuttable presumption that employees have signed checkoff authorizations because of their union security concerns.[58] Moreover, the Board, in its decision, may wish to make clear that consideration of the parties intent and compliance with Section 302 and 302(c)(4) as evidenced by the language of the written dues checkoff authorization and the union security provision in the collective-bargaining agreement would determine whether the presumption has been rebutted as to whether or not the checkoff authorization survives the expiration of the collective bargaining agreement. This may require a more well-articulated precedent by the Board in this area.

From all of the above, I find and conclude that when the Respondent

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(...continued)
agreement. These holdings suggest a conceptual connection between union security and dues checkoff that is much weaker than the connection that Bethlehem Steel and its Proqeny propose. [*73]

[58] *See, e.g. Penn Cork & Closures, Inc.*, 376 F.2d. at 56.

unilaterally ceased the deduction and remittance of dues to the union on behalf of the unit employees (units A and B) after expiration of the collective-bargaining agreements and the 30 day extension thereon, without notice to the Union and without affording the Union an opportunity to bargain with it concerning the cessation of dues checkoff, the Respondent did not violate Section 8(a)(1) and (5) of the Act.[59]

[*74]

The Respondent contends that there are no valid dues checkoff authorizations complying with Section 302(c)(4) of the Act. Section 302 of the Act expressly "makes it unlawful for any employer to pay money to a union representing employees employed in an industry affecting commerce except where deductions are made from wages in payment of union membership dues pursuant to express authorizations by the particular

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[59] *Bethlehem Steel Company, supra; Indiana & Michigan Electric Co., supra; Robbins Door & Sash Co., supra; Ortiz Funeral Home Corp., supra; Sullivan Bros. Printing, Inc. v. NLRB, supra; Southwestern Steel & Supply v. NLRB, supra.*

employees." To be excepted from the Section 302 proscription, it is necessary that the employer's deduction of membership dues occur "under circumstances where the employee has signed an authorization form of the kind specified."[60] Moreover, if the payment does not meet the requirements of Section 302(c)(4) of the Act, payments in lieu of an employ-eels checkoff authorization of union dues are illegal.[61]

[*75]

Even a long-standing practice of deducting dues and paying them over to a union cannot override the explicit statutory proscription against employer payments of dues in the absence of written checkoff authorizations.[62] The

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[60] *Schwartz v. Associated Musicians of Greater New York, Local 802,* 340 F.2d 228, 233, 234 (2d Cir. 1964).

[61] *Int'l. Longshoremen's Ass'n v. Seatrain Lines, Inc.,* 326 F.2d 916, 920 (2d Cir. 1964).

[62] *Jackson Purchase Rural Electric Cooperative Ass'n v. Local Union 816, Int'l. Brotherhood of Electrical Workers,*
(continued...)

Respondent states that the Union does not possess checkoff authorization cards which would validate its claim that the Respondent should be deducting dues from the pay of employees and remitting payments to the Union. The Respondent's employees had signed checkoff authorizations for Local 1-P which was then merged into Local 1-L, the Union herein, as of October 1, 1997. The Respondent asserts that there is evidence in the record that employees were unhappy with the Union therefore "there is no basis for concluding that Quality employees authorizing dues checkoff for Local 1-P similarly supported Local 1-L. . . . A presumption that Quality employees supported the new union in the same measure they supported the former union is not warranted by the record evidence." I do not agree. First, the evidence is insufficient to conclude that employees, although unhappy with aspects of the pension funds, necessarily failed to support Local 1-L as they had 1-P, regarding dues [*76] checkoff authorizations. Barclay's description of what occurred at the Union meeting after the Respondent had declared impasse, and the large membership attendance at this

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(...continued)
646 F.2d 264, 267 (6th Cir. 1981).

meeting would dispel the Respondent's contention in this regard. Next, the Respondent continued employee dues checkoff and remitted the amounts to Local 1-L from October, 1997 through February 1998 presumably on the basis of the employee's written authorizations obtained by Local 1-L. Moreover, in its brief the Respondent states "Quality makes its argument regarding the validity of checkoff authorizations on the premise that Local 1-L obtained authorizations valid during a Collective-Bargaining Agreement term."

The statutory mandate of Section 302(c)(4) can be satisfied only if there are valid, extant checkoff authorizations directing dues deductions and employer remittances [*77] in favor of Local 1-L. Without valid checkoff authorizations, the Respondent's remittances to the Union would be illegal, see Section 302(c)(4). The checkoff authorization in the present case states in part:

I further agree and direct that this authorization shall be automatically renewed for successive periods of one (1) year or for the period of each succeeding applicable collective bargaining agreement, whichever is shorter, and

shall be irrevocable during each such renewal period. . . .

The Respondent asserts that necessarily, without an effective collective-bargaining agreement between it and the Union, the checkoff authorizations of its employees could not have "renewed"; they expired with the last collective-bargaining agreement, and they were no longer valid.

It appears to me that the language of the checkoff authorization in this case is sufficiently ambiguous to be construed in favor of either party. The authorization form states that "This authorization shall remain in effect unless and until revoked by me as hereinafter provided ...", and explaining that: an employee can achieve revocation by notifying the Respondent and the Union not more than twenty days and not [*78] less than ten days prior to the expiration of each renewal period of one year or prior to the termination of each applicable collective-bargaining agreement, whichever occurs sooner." This language however would appear to support the General Counsels, case that the only way these authorizations can be revoked is by the employee's written notice during the prescribed period. On the other hand, the checkoff card also

states. "I further agree and direct that this authorization shall be automatically renewed for successive periods of one (1) year or for the period of each succeeding applicable collective-bargaining agreement, whichever is shorter . . . This language seems to imply that an employee's authorization could also be revoked in the event that no other collective-bargaining agreement is signed.

In *Lowell Corrugated Container Corp., supra,* the Board found that, by the language of the checkoff authorizations, they remained in effect even after the contract expired. In Lowell, the cards were automatically renewed on the expiration of a contract -- the reference there to the one year period, etc. was only in regard to the next period of irrevocability and [*79] did not limit the duration of the employee's authorization. But in the instant case, the construction is such that both the duration of the employee's authorization and the period of irrevocability are limited to a period of one year or for the period of each

succeeding applicable collective-bargaining agreement.[63]

However, the General Counsel is still correct in pointing out that there is nothing in the authorization cards in this case that explicitly states that the authorizations [*80] can be revoked by any means other than written notification. Of course, if the holding of Bethlehem Steel is followed, the question of the renewal of the

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[63] Contrast the more lucid language of the respective authorization cards in Lowell which provides:

> [an employee's authorization] shall be automatically renewed and shall be irrevocable for successive periods of one (1) year each, or for the period of each succeeding applicable collective-bargaining agreement between the employer and the [union], whichever shall be shorter. . . . *Lowell Corrugated Container Corp.*, 177 NLRB at 172.

with the analogous language of the authorization cards in the case at bar.

authorization cards would become irrelevant.

The Respondent also contends that the "General Counsel Impermissibly is Selectively Prosecuting Quality." It maintains that the General Counsel "targets" only those employers who discontinue dues checkoff upon contract expiration and who are charged in the complaints with other unfair labor practices and leaving alone all other employers who also discontinue dues checkoff but are not alleged to have committed anything else in the complaint. The Respondent states that it has been "selectively treated . . . 'based on impermissible considerations', including an intent to inhibit or punish the exercise of legal rights and the malicious or bad faith intent to injure.'"

In *Le Clair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980)*, cert, denied *450 U.S. 959 (1981) (1981)* the court stated:

> Although not precisely on point, cases involving the criminal defense of selective prosecution provide a useful analogy. In *United* States v.

*Berrios, 501 F.2d 1207 (2d Cir. 1974) [*81]* the court held:

To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination. (citations omitted).

Even assuming that the Respondent has sustained its "heavy burden" of establishing at least prima facie, that while others "similarly situated" have not generally been proceeded against because of conduct of the type forming the basis of the charge against the Respondent, (i.e., where the employer unilaterally ceased deducting dues and remittance after collective-bargaining contract expiration, even where the

checkoff authorization may not be limited in duration [*82] to the contract) the Respondent was singled out for prosecution[64], the Respondent has failed to show that the General Counsel has "discriminatorily" selected the Respondent for "prosecution" invidiously or in bad faith or with the "intent to inhibit or punish the exercise of legal rights and the malicious or bad faith intent to injure'."[65] I therefore reject: the Respondent's defense in this regard and find it without merit.

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[64] See Respondent's Exhibit 14 (Operation's Memorandum VII. Bethlehem Steel). Aside from this however, the Respondent offered no other evidence, such as other case instances, where employers were not proceeded against under similar circumstances. This could also be considered legitimate strategy by the General Counsel in seeking a review of the whole Bethlehem Steel issue.

[65] *Le Clair v. Saunders, supra; United States v. Berrios, supra; Moss v. Hornig,* 314 F.2d 89 (2d Cir. 1963). *See Pace Industries, Inc.*, 320 NLRB 661, 666 (1996).

The Respondent's May 8, 1998 Proposal

By letter dated May 8, 1998 to the Union, the Respondent modified its bargaining position to propose the elimination of the union security and dues checkoff provisions in the successor collective-bargaining agreements and to resume negotiations. The evidence herein shows that throughout the negotiations from January-to-March, 1998, the parties never discussed these issues nor had the Respondent made any proposal to change the union security and dues checkoff provisions of the agreements.

The Respondent asserts that its May 8 proposal to delete the union security and dues checkoff provisions of the contracts was made in good faith and was lawful and designed to address the Union's concerns regarding its Inter-Local Fund contributions proposals and allegations of meddling in Union affairs, and to "break the existing impasse and return the parties to the bargaining table . . . ." The Respondent also admits that it was additionally concerned that "the Regional Office and Local 1-L would pursue Section 10(j) relief and an unfair labor practice complaint because of their characterization of Quality's position concerning the 2% Inter-Local Fund [*84]

contribution as meddling with internal union affairs," and this was another purpose of its May 8 proposal, in effect, to make union membership voluntary as an "impasse breaking proposal."

However, the Respondent's proposal to eliminate the union security and dues checkoff provisions on May 8, 1998 came only after the Respondent learned in May, 1998 of Region 29's intention to issue a Complaint in Case No. 29-CA-21820 and two months after the parties' negotiations had broken off. The timing of this proposal, its drastic, unprecedented nature and the fact that the Respondent had not raised this issue previously in bargaining, indicate the Respondent's failure to bargain in good faith with the Union. This is strongly suggestive that the Respondent bargained in bad faith with the Union by making such a regressive proposal in its May 8, 1998 letter to the Union calling for the elimination of the dues checkoff clauses and union security clauses of' the agreements, to retaliate against the Union for having pursued the charges which resulted in the Complaint in this case.

Moreover, the Respondent's assertions as to the purposes of its modification of its bargaining position,

namely to address [*85] the Union's concerns that "Quality intends bargaining about non-mandatory subjects", meddling in internal union affairs regarding the Inter-Local Pension Fund, and to address the "Regional Office's apparent acceptance of Local 1-L's legal position", appears pretextual under the circumstances of this case. Perhaps, if the Respondent truly wanted to address the Union's concern about its insistence to impasse on a non-mandatory topic considered meddling in Union affairs, it could have withdrawn its proposal to change the Union's by-laws requiring members to participate in the Inter-Local Fund. Not only does the Respondent's May 8 proposal do nothing to address the Union's concerns, but to the contrary, it confirms the Respondent's continued insistence on bargaining over the Union's internal affairs. (In its May 8 letter, the Respondent continues to object to the Inter-Local contributions as a "mandatory product of union membership"). However, the mere fact that the Respondent's May 8 proposal was unacceptable to the Union does not necessarily make it unlawful. Similarly, the fact that a proposal is "regressive" does not necessarily establish that it is made in bad

faith.[66] Section [*86] 8(a)(5)of the Act establishes a duty between an employer and its employees, bargaining representative "to enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement.[67] Section 8(d) of the Act requires the parties to "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement." This obligation, of course, does not compel either party to agree to a proposal or to make a concession.[68] In determining whether an employer has engaged in Surface or bad-faith bargaining, the

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[66] Bahcall Industries, 287 NLRB 1257 (1988), review denied sub nom. Teamsters Local 75 v. NLRB, 866 F.2d 1537 (D.C. Cir. 1989); Challenge-Cook Bros. 288 NLRB 387 (1988). [*87]

[67] *Houston County Electric Cooperative*, 285 NLRB 1213 (1987), citing *Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1980).

[68] *Houston Conty Electric Cooperative, supra.* Also see *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

Board examines the totality of the employer's conduct, both away from and at the bargaining table, including the substance of the proposals on which the party has insisted, for evidence of its real desire to reach agreement.[69]

In *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988) ("Reichhold II"), affd. in pertinent part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), the Board reiterated some of the factors that it will consider in determining whether bad-faith bargaining had occurred. These include among others: unreasonable bargaining demands that are consistently and predictably unpalatable [*88] to the other party; unilateral changes in mandatory subjects of bargaining; and insistence to impasse on non-mandatory subjects of bargaining, all of which are present in the instant case evidencing the Respondent's design to frustrate a bargaining agreement. Moreover, the Board has held that the interjection of new proposals after months of bargaining can be evidence of

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[69] *Overnite Transportation Co.*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *United Technology Corp.*, 296 NLRB 571 (1989); *Atlantic Hilton & Towers*, 271 *NLRB* 1600 (1984).

bad faith bargaining.[70] The Board has also held that the assertion of a proposal disingenuously is an indicia of bad-faith bargaining.[71]

From all of the above, and the timing of the Respondent's proposal, its regressive nature, without justification, the Respondent's seemingly pretextual explanation of the purpose therefore, and the Respondent's apparent disingenuous; [*89] assertion of this proposal to the Union, I find and conclude that the Respondent's May 8, 1998 proposal was not made as part of any good-faith effort to reach an agreement, but instead, constituted bargaining in bad-faith with the Union designed to frustrate a collective-bargaining agreement, in violation of Section 8(a)(5) of the Act.[72]

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[70] *Southside Electric Cooperative, Inc.*, 243 NLRB 390 (1979).

[71] *Cook Bros. Enterprises*, 288 NLRB 387 (1988). Also see *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1043 (1996).

[72] The Union in its brief argues that it was stipulated at the trial that (continued...)

(...continued)
throughout the negotiations the parties never discussed either the union security or checkoff provisions and that this presupposes that the "parties were going to leave the union security and checkoff provisions in place." While the Board recognizes that on occasion parties may lawfully engage in regressive bargaining, it is also recognized that a party which withdraws proposals that have already been agreed to may be evidence of bad faith bargaining. *Golden Eagle Spotting Co. v. NLRB*, 93 F.3d 469 (3d Cir. 1996), citing *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983), *Rockingham Machine Lunex Co. v. NLRB*, 665 F.3d 303, 305 (8that Cir. 1981), cert. denied, 457 U.S. 107 (1982) (violation where employer rescinded or modified provisions previously agreed to); *Hartford Fire Ins. Co. v. NLRB*, 456 F.2d 201, 202-203 (8th Cir. 1972) (retreat from previously agreed-upon subjects evidence of failure to bargain in good faith). The Union further states that "In the case at bar, the employer was seeking to change the fundamental relationship between itself and the union." I assume that the Union means by this that the Respondent sought to continue to meddle in Union internal affairs by this proposal. The
(continued...)

[*90]

The Respondent asserts in its brief that despite its "impasse breaking proposal" the Union failed to respond to its May 8 letter in any way or offer any counter-proposal or to request a resumption of contract negotiations. It is well established that it is incumbent upon a union which has notice of an employer's proposed change in terms and conditions of employment to timely

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(...continued)
Union continues that "While an employer is not obligated to agree to a union security or checkoff provision, it has been recognized that employer opposition to such a clause is a strong indicia of surface bargaining. 'A philosophical opposition to [a dues] checkoff, a union-security device, may constitute evidence of bad faith bargaining." (cases omitted). However, since union security and checkoff was never discussed at any of the negotiation sessions at least as to the Union's point, there is insufficient evidence from which to infer that the Respondent opposed such clauses in the successor agreements especially in view of its May 8 letter, as evidencing, in this connection, bad faith bargaining.

request bargaining in order to preserve its right to bargain on that subject.[73] The union cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter.[74] The Respondent states that this is exactly what the Union did in this case, "purposefully renouncing bargaining and contenting itself with the filing of an unfair labor practice charge over the matter ... and it does not provide sufficient basis to sustain the unfair labor practices alleged against Quality."

However, because of all of the circumstances in this case from which a finding of bad-faith bargaining was made by me, it would appear that any resumption of bargaining by the Union with the Respondent, would be futile

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[73] *Citizen's National Bank of Willmar*, 245 NLRB 389 (1979) (citing *The City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978); *Clarkwood Corporation*, 233 NLRB 1172 (1977), *Glove-Union, Inc.*, 222 NLRB 1081 (1976) *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975); *American Buslines, Inc.*, 164 NLRB 1055 (1967). [*91]

[74] *American Buslines, Inc., supra* at 1055-6.

based upon the Respondent's regressive and retaliatory proposal in its May 8 letter which did nothing to alleviate its unlawful bargaining to impasse on a nonmandatory subject of bargaining and its bad-faith bargaining. Therefore, I also reject the Respondent's defense in this regard.[75]

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in Section I, above, have a close, [*92] intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take

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[75] *Contrast Paramount Liquor Company*, 307 NLRB 676 (1992).

certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully bargained to impasse on a non-mandatory subject of bargaining, as a condition precedent to reaching final agreement on successor collective bargaining agreements, it will be recommended that the Respondent be directed to bargain with the Union, upon request, in good faith without insisting to impasse on the non-mandatory subject of the Inter-Local Pension Fund, and without making regressive or retaliatory proposals in bad-faith bargaining.

Having found that the Respondent unlawfully unilaterally implemented the terms and conditions of its last proposals for new successor collective bargaining agreements, I shall recommend that the Respondent be ordered at the Union's request, to rescind the implemented terms and conditions [*93] of employment of its last proposals and reinstate the terms and conditions of employment which existed prior thereto and maintain in effect the terms and conditions of employment in the now-expired collective-bargaining agreements unless the Respondent and the Union bargain to agreement or good-faith impasse, and in the event an

understanding is reached embody such understanding in a signed agreement.[76] Further, the Respondent should be ordered to make-whole unit employees for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful actions herein in accordance with the Board's decision in *Ogle Protection Service,* 183 NLRB 682 (1970) enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed as in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[77]

[*94]

In addition where applicable, the Respondent shall make its employees - whole for any losses resulting from the Respondent's failure to make contractual welfare and pension fund payments in the manner prescribed in *Kraft Plumbing Heating,* 252 NLRB 891 fn. 2 (1980) enfd. mem. 661 F.2d 940 (9th Cir. 1981). Interest on any monies due shall be computed in the manner prescribed in *New Horizons for the Retarded, supra*. The

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[76] *See Winn-Dixie Stores, Inc.*, 243 NLRB 972 (1979).

[77] See also *Florida Steel Corp.*, 231 NLRB 651 (1977) and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

method of determining any additional amounts due to benefit funds shall be made as specified in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section. 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, Quality House of Graphics, Inc., is and has been at all times material herein an employer [*95] engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. Local One-L, Graphic Communications International Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Unit A: The unit of Employees set forth in Article 3 Section 1 of the Photo-Engravers unit collective bargaining Agreement [described more particularly herein.]

Unit B: The unit of Employees set forth in Article 4 Section 4.1 in the Photo-Industrial unit collective bargaining Agreement [described more particularly herein.]

4. At all material times, the union, by virtue of Section 9(a) of the Act has been the exclusive representative of the Respondent's employees in Units A and B, for the purposes of collective bargaining with respect to rates of pay wages, hours of employment, and other terms and conditions of employment.

5. By insisting to impasse over contributions to the Inter-Local Pension Fund, a non-mandatory subject of bargaining, over the Union's objection and as a condition of reaching agreement on [*96] successor collective bargaining contracts, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally implementing the terms and conditions of employment of its final offer without having reached a lawful impasse the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of the Respondent's employees in the above appropriate units in violation of Section 8(a)(1) and (5) of the Act.

7. By making a retaliatory and regressive bargaining proposal the Respondent violated Section 8(a)(1) and (5) of the Act.

8. By unilaterally ceasing the deduction and remittance of dues to the Union after the

expiration of its collective bargaining agreements with the Union, the Respondent did not violate Section 8(a)(1) and (5) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and on the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.[78]

[*97]

ORDER

The Respondent, Quality House of Graphics, Inc., its officers, agents, successors, and assigns shall

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[78] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Insisting to impasse unlawfully regarding contributions to the Inter-Local Pension Fund, a non-mandatory subject of bargaining, over the Union's objection, and as a condition to reaching agreement on successor collective bargaining agreements.

(b) Unilaterally implementing the terms and conditions of employment of its final offer without having reached a lawful impasse and without giving the Union the opportunity to bargain thereon.

(c) Making retaliatory and regressive proposals.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) on request, bargain with the Union as the exclusive representative of the Respondent's employees in the Photo-Engraver and Photo-Industrial units without insisting to impasse unlawfully over contributions to the Inter-Local Pension Fund, a non-mandatory subject of bargaining, over the Union's objections, and as a condition for [*98] reaching agreement on successor collective bargaining agreements, and, if understandings are reached, embody such understandings in signed contracts.

(b) Upon the Union's request, rescind and revoke any and all unilateral changes the Respondent has made in the terms and conditions of employment instituted under its final offer, and in the event of such recission and revocation, make employees whole for any loss of earnings and benefits they may have suffered as a result of such changes as set forth in the "Remedy" section of this

Decision, with interest, less interim earnings.

(c) Rescind its retaliatory and regressive proposal included in its letter of May 8, 1998.

(d) Preserve and, within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(e) Within 14 days after service by the Region, post at its facility in Long Island City, New York, copies of the attached notice marked "Appendix."[79] Copies of the

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[79] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED

(continued...)

notice, on forms provided by the Regional Director [*99] for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days ill conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1998.

(...continued)
STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[*100]

(f) Within 21 days after the service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 22, 1999

Jesse Kleiman, Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT insist to impasse unlawfully over contributions to the Inter-Local Pension Fund, a non-mandatory subject of bargaining, over the Union's objection, and as a condition to reaching agreement on successor collective bargaining contracts.

WE WILL NOT unilaterally implement the terms and [*101] conditions of employment of our final offer without having reached a lawful impasse and bargaining in good faith with the Union.

WE WILL NOT make retaliatory and regressive bargaining proposals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL bargain collectively with the Union in good faith as the exclusive representative of our employees in the

Photo-Engravers and Photo-Industrial units without insisting to impasse unlawfully over contributions to the Inter-Local Pension Fund, a non-mandatory subject of bargaining, over the Union's objections, and as a condition for reaching agreement on successor collective bargaining agreements, and if understandings are reached, embody such understandings in signed contracts.

WE WILL upon request by the Union revoke giving force and effect to any unilateral changes in the terms and conditions of employment instituted in our final offer and in the event of such revocation. WE WILL make our employees whole for any loss of earnings and benefits they may have suffered as a result of such changes as set forth [*102] in the "Remedy" section of this Decision, with interest, less interim earnings.

QUALITY HOUSE OF GRAPHICS, INC.
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any

questions concerning this notice or compliance with its provisions may be directed to the Board's office, One Metro Tech Center, Jay St & Myrtle AVE, 10th Floor, Brooklyn, NY 11201-4201, Tel. 718-330-2862.

(3)

Supreme Court, U.S.
FILED
NOV 22 1999
OFFICE OF THE CLERK

No. 99-501

In the Supreme Court of the United States

DETROIT AUTO AUCTION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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17pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union's campaign promises to provide certain strike benefits in the event of a strike did not impair the employees' freedom of choice in determining whether to select union representation, and thus did not warrant setting aside the election result.

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is unpublished, but the decision is noted at 182 F.3d 916 (Table). The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet App. 30a-53a) is reported at 324 N.L.R.B. No. 143. The Board's underlying decision and certification of representative (App., *infra*, 1a-3a) is unreported. The hearing officer's report on petitioner's objections to the certification election (Pet. App. 54a-107a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1999. The petition for a writ of certiorari was filed on September 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

BEST AVAILABLE COPY

STATEMENT

Detroit Auto Auction (petitioner) is engaged in remarketing automobiles through auction sales. In 1995, the United Automobile Workers (Union) filed a petition with the National Labor Relations Board (Board) seeking certification as the exclusive bargaining representative of petitioner's drivers, mechanics, and certain other employees. In a secret ballot election, 79 votes were cast in favor of the Union, 45 votes were cast against it, and 11 votes were challenged (a number that could not affect the outcome of the election). Pet. App. 3a-4a, 34a, 54a-57a.

Petitioner filed objections to the election. The only objection at issue here (see Pet. 5) is petitioner's contention that the Union impermissibly promised employees benefits in exchange for their support. The facts relating to that objection are as follows: During the campaign, Union organizer Reyes distributed photocopies of three "coupons" to petitioner's employees. Coupon 1 states, "I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. [*sic*] NO ONE FROM THE UAW WILL FORCE YOU TO STRIKE." Pet. App. 94a-95a, 108a. Coupon 2 states, "I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150 a week from the strike fund. Whether or not you've ever paid dues." *Id.* at 95a, 109a. Coupon 3 states, "I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines." *Id.* at 95a, 110a. Each of the coupons contained the following language on the back: "To protect yourself against false promises by

some union bosses and 'union pushers' we suggest you get certain promises guaranteed in writing. Ask the union boss or union pusher to sign and date each of the enclosed union guarantee certificates. Have it notarized to be protected." Each of the coupons bore Reyes' photocopied signature, which was dated and notarized. *Id.* at 95a-96a, 108a-110a.

The hearing officer recommended that petitioner's objection be overruled. Pet. App. 94a-98a. The hearing officer found that the statements in the three coupons were merely campaign propaganda, and that such propaganda is insufficient to warrant setting aside an election. *Id.* at 96a-98a. In reaching that conclusion, the hearing officer relied on *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982). In that case, the Board held that it would "no longer probe into the truth or falsity of the parties' campaign statements" and would "not set elections aside on the basis of misleading campaign statements." *Id.* at 133. Rather, it would "intervene" only in cases "where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Ibid.*

The Board adopted the Hearing Officer's recommendation and overruled petitioner's objections. App., *infra*, 1a-2a. The Board expressly rejected petitioner's contention that the statements in the coupons constituted an impermissible promise of future benefits. *Id.* at 2a n.2. The Board explained that it "has long held that the promise of strike benefits addresses a natural employee concern and does not impair employee free choice." *Ibid.* (citing *Dart Container*, 277 N.L.R.B. 1369 (1985)). The Board therefore certified the Union as the exclusive collective-bargaining representative of petitioner's employees. *Id.* at 2a-3a.

2. When petitioner refused the Union's request to bargain, the Union filed an unfair labor practice charge with the General Counsel of the Board. The General Counsel then issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). The Board upheld the allegations of the complaint and ordered petitioner to bargain with the Union. Pet. App. 30a-53a.

3. In an unpublished opinion, the court of appeals enforced the Board's order. Pet. App. 1a-29a. The court held that the Board had correctly determined that the coupons constituted permissible campaign literature and not illegitimate vote buying. *Id.* at 7a-19a. The court explained that the coupons promised the "type of future benefits that unions normally seek to obtain for their members," that "the benefits promised by the coupons would insure to all employees * * * in the bargaining unit," that "the promises were clearly attributable to the Union and could be evaluated by an employee as identifiable campaign literature," and that "nothing in the coupons threatened, directly or indirectly, that an employee would suffer any kind of economic loss if the Union was defeated." *Id.* at 17a-18a. The court concluded that, while the "distinction between legitimate campaign promises and illegitimate vote-buying may at times be subtle and problematic," in this case, "the distinction is clear." *Id.* at 18a-19a.

ARGUMENT

Petitioner contends (Pet. 16) that the court of appeals erred in holding that the coupons distributed by the Union in this case constituted legitimate campaign literature rather than impermissible vote-buying. That

contention is without merit and does not warrant review.

1. In evaluating whether particular campaign tactics are impermissible, the Board applies an objective standard. As petitioner acknowledges (Pet. 7), the question is whether the challenged conduct "reasonably tend[s] to interfere with the Section 7 rights of employees to make a free, uncoerced decision on the question of whether they wish to be represented by a union." See also Pet. 21. Petitioner does not challenge that legal standard. Accordingly, the only question presented here is whether the Board reasonably applied its objective standard to the particular facts of this case. That question is entirely fact-bound; it does not raise any issue of general importance. Further review of that question is therefore not warranted.

Review of such a fact-bound issue is particularly unwarranted here, because the decision below is unpublished. The decision therefore is not binding on subsequent Sixth Circuit panels. See 6th Cir. R. 206.

In any event, petitioner's challenge to the decision below is without merit. The Board has a "wide degree of discretion" to establish the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Here, the Board reasonably concluded that the Union's promises that (1) a strike would require authorization by two thirds of the employees, (2) employees would receive $150 a week from the Union's strike fund if a strike were authorized, and (3) employees would be free to cross the picket line constituted permissible campaign speech and did not preclude a fair election.

Several considerations support the Board's determination. First, because Union organizer Reyes signed

the coupons, the coupons clearly indicated that the promises emanated from the Union. The employees were therefore in a position to evaluate the coupons as union propaganda. Second, petitioner itself treated the coupons as union propaganda. In response to Coupon 2's promise of a $150 weekly strike benefit, petitioner circulated a flyer purporting to show that employees of another employer relied to their detriment on the Union's promise of strike fund payments. NLRB C.A. Br. 27. Petitioner followed that flyer with another showing Coupon 2 cut in half, with the caption, "UAW BROKEN PROMISE!" *Ibid.* Third, the promises made in the coupons addressed matters of natural concern to employees in a strike situation, and sought to allay that concern by explaining what benefits the Union would provide if it decided to call a strike. Indeed, petitioner acknowledges that "the subject of strikes," with the "possibility of being out of work without pay," was "a critical issue during the pre-election campaign" (Pet. 15), and that "the employees in this case were well aware of how unions do not tolerate employees crossing a picket line" (Pet. 23). Finally, voting for the Union was not a condition for receiving the promised strike benefits. The coupons promised that all employees would receive those benefits. Those circumstances fully justify the Board's conclusion that the coupons constituted legitimate campaign literature and not impermissible vote-buying.

2. Petitioner errs in contending (Pet. 17) that, because the Union's promises could be fulfilled without petitioner's consent, they necessarily amounted to coercive vote buying. A union's ability to fulfill a promise without an employer's consent is a factor that has been deemed relevant in some cases. But promises that

can be fulfilled without an employer's consent are not per se illegal.

This Court's decision *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), and the decisions implementing it, demonstrate that point. In *Savair*, a union announced a waiver of its initiation fee before an election. The waiver applied only to employees who signed union recognition slips before the election. *Id.* at 272-273. The Court held that such a *selective* waiver impermissibly interfered with employee free choice to vote for or against union representation in two ways. First, the union was able to "buy endorsements" and thus "paint a false portrait of employee support during its election campaign." *Id.* at 277. Second, at least some employees might have felt obligated, when they subsequently voted in the election, "to carry through on their stated intention to support the union." *Id.* at 278.

Despite invalidating the union's selective waiver, the *Savair* Court recognized that a union has a legitimate interest in waiving its fee for new members when the waiver is "available not only to those who have signed up with the union before an election but also to those who join after the election." 414 U.S. at 274 n.4. The Court explained that employees may be reluctant to pay money to a union before the union shows that it can do anything for them; a waiver of initiation fees "remove[s] this artificial obstacle to [employees'] endorsement of the union." *Ibid.* (quoting *Amalgamated Clothing Workers* v. *NLRB*, 345 F.2d 264, 268 (2d Cir. 1965)). Consistent with that observation, since *Savair*, the Board and the courts of appeals have consistently held that offers to waive fees for all employees currently in the work force do not interfere with employee free choice in representation elections and therefore are not improper inducements under *Savair*. See, *e.g.*,

NLRB v. *VSA, Inc.*, 24 F.3d 588, 594 (4th Cir.), cert. denied, 513 U.S. 1041 (1994); *NLRB* v. *Whitney Museum of Am. Art*, 636 F.2d 19, 21 (2d Cir. 1980); *Molded Acoustical Prods., Inc.* v. *NLRB*, 815 F.2d 934, 937 (3d Cir.), cert. denied, 484 U.S. 925 (1987); *Warner Press, Inc.* v. *NLRB*, 525 F.2d 190, 196-197 (7th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

The principle involved in those cases is equally applicable here. Like the waiver of fees approved in those cases, the strike benefits referred to in the Union's campaign materials were available to all employees, not just those who supported the union before the election. In addition, just as a union has a legitimate interest in waiving fees, the Union in this case had a legitimate interest in promising strike benefits—to alleviate natural employee concerns. Therefore, as with a waiver of initiation fees that is available to all employees, the Board reasonably concluded that the promised strike benefits did not interfere with employee free choice. A union's ability to confer strike benefits without an employer's consent no more condemns a promise to provide such benefits than a union's ability to waive its fees without an employer's consent condemns that action.

Alyeska Pipeline Service Co., 261 N.L.R.B. 125 (1982), relied on by petitioner (Pet. 12, 17), does not suggest otherwise. In that case, a union that controlled all access to construction jobs in Alaska promised the employees it sought to organize a preference in job referrals if they became members of the union. The Board found that the union possessed "a power comparable to an Employer's power to close a plant," and that the union "imparted an aura of legitimacy to its unlawful promise" by quoting from "its collective bargaining agreement the manner in which the referral advantage

for union members is effectuated." 261 N.L.R.B. at 127. The Board concluded that, in those circumstances, the union's promise was "more coercive than the promise to waive initiation fees which the Supreme Court in *Savair* found unlawful," and thus precluded a fair election. *Ibid.* Since the Union here possessed no similar control over the employment conditions of the employees it sought to organize at petitioner's facility, the decision in *Alyeska* is inapposite here.

Petitioner's reliance (Pet. 8, 19) on *Mailing Services, Inc.*, 293 N.L.R.B. 565 (1989), is similarly misplaced. There, the union provided free medical screenings for employees shortly before the election. The Board found that the union had conferred a tangible economic benefit on employees, "with a clear implication that this benefit would remain only contingent on the selection of the Union." That circumstance "created an incentive for the employees to take the test prior to the election," and "therefore * * * the recipient of this gift would likely have felt a sense of obligation to the donor, the Union." *Id.* at 566 n.3. Unlike the situation in *Mailing Services*, the Union's promises of strike benefits here did not result in any tangible economic benefit for the employees before the election. Rather, the benefits would materialize only if the Union were selected as the bargaining representative and decided to call a strike. And, as previously discussed, the benefits would be available to all employees, irrespective of whether they had voted for the Union. There is therefore no inconsistency between the decision in *Mailing Services* and the decision in this case.

3. Finally, petitioner contends (Pet. 27-30) that the decision below creates a double standard under which employer promises of benefits are unlawful, while union promises of benefits are harmless propaganda. Neither

the Board nor the court below, however, purported to establish any such rule. They simply ruled that, in light of the particular circumstances of this case, the Union's campaign literature did not constitute coercive vote-buying.

Moreover, petitioner's apparent premise that an employer's actions and a union's actions always have the same potential to coerce employees is incorrect. In view of the economic dependence of the employees on their employer, the employer occupies a different position with regard to the impact of its action upon employees than does a union. See *Rendell Warehouse of Ariz., Inc.*, 328 N.L.R.B. No. 153 (July 27, 1999); Pet. Supp. App. 361a, 378a-383a; *Louis-Allis Co.* v. *NLRB*, 463 F.2d 512, 517 (7th Cir. 1972); *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969). As one leading commentator has observed, "[u]nlike the employer's promise of benefits conditioned on a rejection of the union, the union's economic promises are not tantamount to a threat which it will be in a position of power to implement in the event a majority of the employees support 'no agent.'" R. Gorman, *Labor Law* 170 (1976).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
National Labor Relations Board

NOVEMBER 1999

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 7-RC-20648

DETROIT AUTO AUCTION, INC., EMPLOYER

AND

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER

BFH, Taylor, Michigan

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 11, 1995, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 79 for and 45 against the Petitioner, with 11 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings[1] and recommendations,[2] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union United Automobile, Aerospace and Agricultural Implement Workers of American (UAW), AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In recommending that Objection D be overruled, the hearing officer found that the language contained in Petitioner's three coupons, which were distributed during the campaign, was merely campaign propaganda which is insufficient to warrant setting aside an election under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). We agree with the hearing officer that the language contained in the coupons was unobjectionable campaign propaganda. As to the Employer's contentions that the statement in the coupons concerning the union's strike fund and strike benefits constituted an impermissible promise of future benefits, we note that the Board has long held that the promise of strike benefits addresses a natural employee concern and does not impair employee free choice. *Dart Container*, 277 NLRB 1369 (1985).

In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule the Employer's objections A and F. We also adopt the hearing officer's recommendation that the Employer's request to withdraw its objection E be approved.

lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

Dated, Washington, D.C., January 14, 1997.

/s/ MARGARET A. BROWNING
MARGARET A. BROWNING, Member

/s/ SARAH M. FOX
SARAH M. FOX, Member

/s/ JOHN E. HIGGINS, JR.
JOHN E. HIGGINS, JR., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

(4)

No. 99-501

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DETROIT AUTO AUCTION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER IN REPLY

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ARGUMENT

This case is about promises of new benefits to employees during the critical period prior to a union representation election. This case is not about election campaign propaganda addressing the natural concerns of employees or campaign statements about existing benefits.

In NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973), this Court rejected the National Labor Relations Board's (hereinafter referred to as the "Board") conclusion that employees were not coerced when a union promised that it would not charge an initiation fee to those employees who signed recognition slips.[1] In this Court's view, "the

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[1] The Board will not hold an election on a petition if the petition is not supported by at least 30% of the employees in the petitioned-for bargaining unit. National Labor Relations Board's Rules and Regulations, Sec. 101.13. The necessary support is typically evidenced by "authorization" cards (referred to as "recognition slips" in Savair) signed by employees in which they authorize the union to act as their exclusive collective

(continued...)

Board's analysis ignore[d] the realities of the situation." Savair, 414 U.S. at 277. This Court explained that "an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. . . . By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." Savair, 414 U.S. at 277.

The Board in the present case also ignored "the realities of the situation." The Union's promises here were even more egregious than in Savair because the promises were conveyed during the critical period just prior to the representation election. Therefore, the promises effectively allowed the Union to buy votes, not simply authorization cards or endorsements "to paint a false portrait of employee support."

The Union promised strike-related benefits to, as the Government admits, *alleviate* employee concern over strikes

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(...continued)
bargaining representative.

(Gov. Br. 8). Because of the Union's promises, the consequences of a possible strike were no longer a concern for employees. The Union promised employees that, in the event of a strike, they could honor the picket line and receive $150.00 each week in compensation from the Union (whether or not the employees ever paid dues to the Union) or cross the picket line with the Union's permission, continue to receive a paycheck from the employer and suffer no retribution (e.g., fines, intimidation). Lastly, the Union promised to make a strike a less likely event by raising the voting standard for a strike to a "super" majority, 2/3 of all the employees in the bargaining unit. These promises were made against the backdrop of the violent strike at the Detroit Newspapers, which was well known in the Detroit area where Petitioner is located. See generally, NLRB v. Detroit Newspapers, 185 F.3d 602, 604 (6th Cir. 1999). The Board was required to apply the objective, tendency-to-influence standard and find that the promises interfered with employee free choice.

The Government, however, cites Savair and contends that the promises were not vote-buying promises because the promised-for benefits were extended to all employees, not just those who supported the Union. Obviously, the

employees would understand that the strike benefits were implicitly conditioned on a vote for the Union. These benefits would only be available to employees if the Union won the election. The fact that the Union's promises were not expressly conditioned on a vote for the Union does not mean that the promises did not have a vote-buying affect. If this were true, an employer could promise all employees—not just those who vote against a union—a 50¢ per hour pay increase. This Court explained in Savair that although the benefits conferred by an employer in its Exchange Parts decision were unconditional, the "employees were 'not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.'" Savair, 414 U.S. at 280, *quoting* NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

Similarly, the unconditional promise of strike-related benefits made by the Union would also have a coercive affect upon the electorate. The promises would reasonably tend to cause employees to vote for the Union because the possibility of a strike would no longer pose a hardship to them. Also, nonunionists may have cast their votes for the Union fearing that, if the Union

won the election, the Union could renege on its promise if a strike occurred. *See* Savair, 414 U.S. at 281 ("the failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win").

The Government's *quid pro quo* argument is also contrary to the Board's own decision in Alyeska Pipeline Service Co., 261 NLRB 125 (1982). In Alyeska, the Board found that a union interfered with employee free choice when it promised that union membership would mean favorable priority position to secure job opportunities. The Board found the statements to be coercive because the union had the power to effectuate the promise, in contrast to those nonviolative promises that can only be achieved through collective bargaining. Alyeska Pipeline Service Co., 261 NLRB at 127 n.4. The dispositive factor was that the union in Alyeska, like the Union here, had the power to effectuate the promise, thereby suggesting "a fist inside the velvet glove." Alyeska Pipeline Service Co., 261 NLRB at 127.

Citing Dart Container, 277 NLRB 1369 (1985), the Government argues that employee free choice was not interfered

with simply because the Union's promises addressed a *natural employee concern* (Gov. Br. 3). This argument is illogical and unsupported by Dart Container. If the amount of employee concern over the promised-for benefit was the yardstick by which promises were measured, employers would be permitted to promise workers all kinds of benefits, e.g., wage increases, more paid time off, free health insurance during the term of their employment. But it is not lawful for an employer to make such a promise during the pre-election period. Nor is it lawful for a union to make such a promise on a matter that is within its exclusive control. Alyeska Pipeline Service Co., 261 NLRB 125 (1982). As the Government admits in its brief (Gov. Br. 5), the Board has long applied an objective, tendency-to-influence standard in evaluating whether certain campaign tactics interfere with employee free choice.

Dart Container does not stand for the proposition that a promise is excused so long as it addresses a natural employee concern. Rather, the Board found that the promises in that case did not interfere with the election because the union simply pointed out *existing* benefits enjoyed by its members. Dart Container, 277 NLRB at 1370. The Board explained that "[j]ust as an employer can

call attention to benefits that its employees in the proposed unit currently enjoy, so, too, can a union point out the benefits its members currently enjoy." Dart Container, 277 NLRB at 1370. Here, however, the Union's promises were not about *existing* benefits, but rather new benefits. Therefore, The Board was required to apply its objective, tendency-to-influence test to the Union's promises.

But the Government characterizes the promises as campaign propaganda and maintains that the tendency-to-influence standard is not applicable to the Union's promises (Gov. Br. 5). In doing so, it ignores this Court's landmark Gissel Packing decision. Over thirty years ago, this Court stated that the right to free speech under the First Amendment does not extend to promises. NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969).

Not only does the Government ignore Gissel Packing, it contends, without any legal authority whatsoever, that four "considerations" support the Board's determination that the Union's promises constituted "permissible campaign speech" (Gov. Br. 5-6). Initially, the Government argues that the promises were excusable campaign propaganda because *the Union*

made the promises. But unions, like employers, are prohibited from making pre-election promises. Mailing Services, Inc., 293 NLRB 565, 566 n. 3 (1989). Secondly, the Government argues that the promises became campaign propaganda after the Petitioner told the electorate that the Union had broken promises in the past. Any response by the Petitioner to the Union's promises cannot logically change the original, coercive character of the Union's promises. *See* Alyeska Pipeline Service Co., 261 NLRB 125 (1982). Thirdly, the Government contends the promises were benign because the promises "addressed matters of natural concern to employees" (Gov. Br. 6). There is no safe harbor in labor law jurisprudence for promises that respond to the *natural concerns* of employees. If anything, promises on employee concerns, as opposed to promises on irrelevant matters, would logically be the most coercive. Fourthly, contrary to the Government's argument, the Union's promises are not judged by the presence or absence of an express *quid pro quo* (strike benefits in exchange for a vote for the Union). Rather, promises are evaluated by the Board's objective, tendency-to-influence test. Under this standard, the Union's promises had a reasonable tendency to coerce employees.

CONCLUSION

This case warrants review because the Union's promises present an extension of Savair. The Union's promises were made prior to an election and not during the pre-petition phase which this Court found unlawful in Savair. Granting the petition for writ of certiorari would afford this Court an opportunity to offer guidance on the subject of union promises, a subject it has not addressed since 1973 in Savair.

Respectfully submitted,

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